

**The Austin Company and Kevin Todd and James Blake and Charles Shelton and John Ford and Gary Sorter and Steve Johnson and Painters District Council #5, International Brotherhood of Painters & Allied Trades, AFL-CIO.** Cases 19-CA-22241, 19-CA-22243, 19-CA-22296, 19-CA-22308, 19-CA-22321, 19-CA-22343, and 19-CA-22546

October 31, 1994

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On May 18, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, to which the Charging Party, Painters District Council #5, affiliated with International Brotherhood of Painters & Allied Trades, AFL-CIO (Painters), joined, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel and Charging Party Painters have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Joan Abrevaya, Esq.*, for the General Counsel.  
*Frank Borda, Esq.* and *Jesse Etelson, Esq.*, of Silver Springs, Maryland, for the Respondent.  
*Richard H. Roblee, Esq.* (*Hafer, Price, Rinehart & Roblee*), of Seattle, Washington, for the Union.

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Seattle, Washington, on December 7, 8, 9, and 10, 1993, and January 11, 12, and 13, 1994. The charges were filed by the various named individuals on various dates between August 20 and October 16, 1992, and by Painters District Council

#5, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union), on February 17, 1993. Various amended charges were also filed. On April 30, 1993, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging a violation by The Austin Company (Austin or the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. Upon the entire record,<sup>1</sup> and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is an Ohio corporation with an office and place of business in Renton, Washington, and at the Boeing Company's Everett, Washington facility, where it has been engaged in the business of designing, engineering, and constructing buildings for the Boeing Company. In the course and conduct of its business operations the Respondent has had annual gross sales of goods and services valued in excess of \$500,000, and has purchased goods valued in excess of \$50,000 directly from suppliers outside the State of Washington. It is admitted, and I find, that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Issues*

The principal issue in this proceeding is whether the Respondent discharged the various charging parties in violation of Section 8(a)(1) and (3) of the Act because they engaged in union and protected concerted activity.

##### B. *The Facts*

##### 1. Background

The Respondent was hired to construct a number of buildings for the Boeing Company in Everett, Washington, for the manufacture of airplanes. The buildings are massive, many times the size of a football field, totaling approximately a million-and-a-half square feet, with 130-foot high ceilings. This project has been continuing over several years. At peak periods, the Respondent directly employed about 600 construction workers on the project (including about 100 painters); the painters were hired out of the Union's hiring hall

<sup>1</sup> The Union's unopposed motion to correct transcript is granted.

and were represented by the Union herein. About 400 or 500 hundred additional employees worked at the site for various subcontractors of the Respondent.

The instant case involves several painting crews, totaling about 20 painters who worked on the second shift, which began at 4 p.m. each day. Much of their work was performed on or adjacent to the "rolling work platform" which is a large wooden platform approximately 350 feet in length by about 100 feet in width; the platform is about 100 feet off the floor, and some 30 feet from the ceiling of the buildings. This platform would be moved at about 10-day intervals to an adjacent division of the building in accordance with a pre-determined schedule. All of the work above the platform, including the painting work, was to be essentially completed by the time the platform was to move to the next division, as it was time consuming and costly to go back and complete work after the platform had been moved; thus, if the platform was not positioned underneath the work to be done, the workers would have to be raised 130 feet off the floor by hydraulic lifts with limited mobility to perform such work, instead of only some 30 feet above the rolling work platform.

Various construction trades including carpenters, pipefitters, steelworkers, operating engineers, electricians, mechanics, and laborers worked off the platform during the day, and the painting of the area above and adjacent to the platform was performed on the second shift, after the other construction workers had left for the day. Much of the painting was done from "swing stages" or "spider stages" which contained two baskets connected by a platform from which the painters would be able to reach the areas to be painted. The swing stages, similar to the devices used by window washers to raise and lower themselves on the outside of buildings, were hung from the ceiling by cables, and could be moved through the air by a procedure called jumping or transferring which requires a considerable degree of skill; painters who perform such work are referred to as "fliers" and sometimes as "spidermen." The painters earned the same hourly wage whether they were fliers or merely scraped concrete off the stairwells in the tower.

The principal events herein took place on the second shift in August and September 1992.<sup>2</sup>

From about December 1991 until sometime in July 1992, the second-shift painters worked an unlimited number of overtime hours in order to get the painting done within the allotted time, working from 60 to 80 hours per week. This changed in July, when Boeing instructed Austin to limit the workweek of the second-shift painters, including overtime, to 60 hours. This 60-hour workweek was again reduced the following month when, in early August, a 40-hour workweek, with no overtime, was established; and, in order to complete the work prior to the scheduled moving of the platform, first- and third-shift painters were utilized to perform work that the second-shift painters had exclusively performed up to that point.

Mike Cook was the Respondent's second-shift general painting foreman. Under him were two foremen, Jose Robles and Brian Crowley. Generally, Robles was in charge of some 15 painters who worked off the rolling work platform, and

Crowley was in charge of about 5 painters who worked at other locations principally within the "tower" sections of the building which were in effect distinct multistoried structures; the towers extended from the floor to the ceiling and, upon completion, would be used for various purposes such as office space and, apparently, equipment and materials storage areas.

## 2. Evidence presented by the General Counsel and the Union

### a. *The alleged safety concerns*

Kevin Todd and James Blake had worked on Robles' crew as journeymen painters since late December 1991, when the second-shift interior painting work had begun; they worked almost exclusively out of the swing stages and were experienced fliers. They testified that Robles, Crowley, and Cook, in an effort to increase production, would attempt to cause the painters to forego established safety procedures. Thus, the various foremen would ask men to "walk steel" without being tied off to safety cables, or to do work without safety harnesses, or to operate the Genie (hydraulic) lifts without outriggers (stabilizers), or each time the platform was moved, to erect the plastic containment curtain or tent around the platform by walking steel without the proper safeguards in order to pull the curtain up to the ceiling by means of ropes.

According to Todd and Blake, the men did bring these matters to the attention of their foremen, but received no satisfaction; further, they were reluctant to bring such matters up to the Respondent's safety department or to raise them during regularly scheduled weekly "toolbox" or safety meetings for fear of retaliation by the foremen. Thus, until sometime in August when things became intolerable, the men did what their foremen directed them to do, regardless of the safety hazards; and the more experienced men such as Todd and Blake would voluntarily walk steel without being tied off and would perform other unsafe procedures in order to protect the "greenhorns" from the possibility of serious injury. At all times material herein the painters' union steward, Joseph Bailey, was working with the crew on the second shift, and there is no evidence that the steward filed any grievances on behalf of the employees regarding these matters.

Todd testified that many times in June and July and "throughout the whole job" he brought up these safety concerns to his forman, Robles. He testified further as follows:

I have to say there were many times where I willingly did break safety violations by request of Jose Robles strictly to keep him from asking inexperienced men to do any of it, for fear that they would hurt themselves or somebody else. And I have had much experience at this kind of work, so I would do the work that was the more dangerous, myself and a few other people. Jim Blake, Charles Zuehlsdorff, we've had lots of experience on high steel.

Steve Johnson, another flier, testified that he had similar safety concerns:

There was some—there were fellows who were walking steel without being tied off. It was the sort of situation where it looked like—most of the hands that were

<sup>2</sup> All dates or time periods hereinafter are within 1992 unless otherwise indicated.

doing the walking of the steel at those times were the fellows who were very comfortable with doing it. And it was like management sort of turned their backs because it got things done faster. And if the guys were willing to do it and seemed comfortable up there, it was sort of ignored. Now, it was understood that was not supposed to happen; but it also was ignored.

Johnson testified that Robles would observe such safety violations going but, in an effort to get the work done faster, would not instruct the men to adhere to the safety requirements. Finally, according to Johnson, the men complained to “safety” (Austin’s onsite safety department), as they were not getting any satisfaction from Foremen Cook or Robles.

Todd testified that there was a safety meeting every Monday, and that every type of safety issue would be covered at these meetings, as follows:

Every kind of issue: proper protective clothing to wear; the proper things to do and not to do in JLG’s (hydraulic lifts) or spider stages, respiratory equipment was required, or everything that pertains to the job. It’s always different every week so that you don’t get hung up on the same thing.

However, according to Todd, after the safety meetings the rules were not enforced:

I can give many examples. They would have safety meetings on tying off—you’re always supposed to be tied off; you’re supposed [to tie] to something above you; and you’re not supposed to work above six feet above the ground or from the platform or from the edge of the platform without being tied off at all times; you are always supposed to wear safety glasses and respirators—and as soon as the meeting was over, the rules didn’t apply.

What applied was production. Production applied, and that was basically it. There was many times the rules were broken. And there was, on several occasions, times where Mike Cook, Jose Robles or Brian Crowley would come up and say to us personally, “Safety [engineers] will be up later; make sure you’re doing everything the proper way.”

When “safety” was not present, according to Todd, things were done differently: the men worked without being tied off, they did not wear respirators or hard hats or safety glasses as they were required to do; they smoked inside the containment tent. Todd testified that “half the people hardly wore safety glasses or hard hats. Sometimes they didn’t wear safety belts. A lot of times guys wore tennis shoes when you weren’t supposed to.”

#### *b. The complaints to management*

Toward the end of July, when it was announced that there would be no more overtime, Cook told the men that he would be forced to terminate them if production did not increase. During the second week in August, according to Todd, the men started to “whine over the dinner table.” Thus, the men would complain during the dinner break that they were tired of being asked by foremen to do this or that. Many of their complaints had to do with safety violations.

At one such meeting, attended by painters Todd, Blake, Steve Johnson, Gary Sorter, Gary Johnson, and Union Steward Joe Bailey, Todd said that he would go to the safety department with the painters’ concerns. Thereupon, on August 13, he approached Safety Engineer Russ Evans and said that he had some safety concerns that he wanted to bring to the attention of the safety department. Evans, according to Todd, said that he was very interested and encouraged Todd to present his concerns. He invited Todd to come to the safety department the following day to speak with Brenda Toole, the Respondent’s controls manager.

Todd testified that he met with Controls Manager Toole on August 14, and presented all the complaints of the painters: inexperienced men being required to do work they were not qualified to do; men being asked to overlook blatant safety violations, like walking steel without being tied off, using Genie lifts without outriggers, and working without proper safety equipment. Toole asked Todd to write down his concerns and to have the other painters write down their concerns and bring them to her. Todd met with the men and told him that he had met with Toole and that she wanted their complaints in writing; according to Todd, they were willing to put their concerns in writing but would not sign their names for fear of retaliation. On Monday, August 17, Todd presented the written concerns to Toole.<sup>3</sup> Toole said she would evaluate them and give them to James Peterson, the Respondent’s vice president in charge of the overall project.

The next day, August 18, Todd told Safety Engineer Evans that “attitudes were what we considered high and tense”; that management had a different attitude and were watching the men and were watching Todd very closely. He asked Evans if Cook had found out about his safety complaints. Evans acknowledged, according to Todd, that someone had made Cook aware that certain complaints had been made to the safety department, but that Todd had not been identified as the complainant. Todd testified that on that day, August 18, he observed Safety Engineer Evans and Controls Manager Toole walking through the job unannounced in order to observe what was going on; according to Todd, such inspections had not even been announced to Cook in advance.

On August 19, he again met with Toole. He asked her what was being done about the safety concerns, as “there was a lot of tension on the job during our shift that you could feel.” According to Todd, “the foremen were pushing a lot harder; they were watching harder; and they were doing whatever they could do to get the job to speed up and get the work done.” Todd told Toole that he “wanted the unfair management run off the job.” Further, he wanted “safety” to start policing the job and requested, if necessary, that a safety engineer remain there throughout the whole shift so the men could do their work safely and without all the harassment. He told Toole that he would go to OSHA and WSHA (the Washington State counterpart of OSHA), that he would file a grievance with the Union; that he would go to the Boeing safety department, to the newspaper, and even to the paint manufacturer to let them know that the paint was not being applied according to specifications. Todd testified that his purpose in threatening to take such action constituted

<sup>3</sup> The written complaints, for the most part, were simply reiterations of the complaints that Todd had verbally presented to Toole.

a “grab for any attention” in order to get the matters out in the open. Toole asked Todd to give her time to investigate the matters; thereafter, if he felt they were not being properly addressed by the safety department, he could take his concerns to whomever he wanted.

Further, Toole told Todd that she had recently given Cook a handful of blank safety citations and had advised him that he had better begin issuing citations to painters who were breaking the safety rules. She also told Cook, according to Todd, that if a safety citation was appealed by a painter and it was found that a supervisor had told the painter to break a safety rule, then the supervisors would be written up. Finally, Toole told Todd to be careful and watch out for himself.

#### *c. The reassignment of Todd and Blake*

Todd got to work somewhat late the afternoon of August 19, because of his meeting with Toole, and when he got off the elevator on the sixth floor, Cook was standing on the catwalk. He looked at his watch and said that Todd was late. Todd said that he had been in Toole’s office, and that Cook could verify this if he wanted to. Todd then began helping another painter on the platform. A short time later Cook issued him a safety citation for not wearing his safety glasses. According to Todd, he had inadvertently left his safety glasses in Toole’s office.

After receiving the citation and obtaining other safety glasses, he reported to Robles for work. Robles told him that he and Blake would no longer be fliers, but rather would be put to work down on the platform where they would be working off ladders prepping steel for painting. Todd asked Robles why he was being moved from his job as a flier, and Robles said that he did not have to explain the reason for his work assignments. Todd and Blake were replaced by inexperienced fliers. Prepping steel, according to Todd, was for “greenhorns.”

That night Cook held a crew meeting with the painters. Todd had excused himself from the meeting to go to the restroom, which is six floors below the rolling platform, and missed the meeting. Foremen Cook and Crowley stopped Todd as he was returning from the restroom, and Cook told him that if production did not pick up he would have no choice but to terminate Todd and the rest of the painters. Todd asked Cook why he had been moved from the swing stage and had been assigned the job of prepping steel, and Cook said that he did not have to explain “shit” to him and that he should just do what he was told or he would be fired.<sup>4</sup>

Todd apparently began prepping steel about 8 feet above the platform. However, observing that the swing stage directly above him had no toeboards,<sup>5</sup> he refused to work any longer as he was concerned about something falling off the stage and injuring him. Blake had the same concerns. According to Todd, three of the four swing stages had

toeboards missing. Todd left the platform and went to the safety engineer’s office to report the matter and also to call his business agent to report that he was being treated unfairly on the job. A safety engineer told the three swing stages to report to the platform, and advised the foremen that no further work was to be done until toeboards were installed. Thereupon, Crowley made toeboards for each of the swing stages, and told the men to get back to work. This took about 15 to 20 minutes per stage.

On August 20, Todd met with Toole to advise her of the harassment toward him and a couple of other painters. Another safety engineer was in the office. Toole asked if she could invite Richard White, the general project superintendent and her direct supervisor, into the meeting. Todd said that this would be fine. Also, at some point, Blake and Steve Johnson came into the room. Todd explained what was happening on the job, namely, that his removal from his regular job as a flier was punitive, in retaliation for complaining to the safety department. Todd said that he was being watched, and was in fear of losing his job. Apparently, Todd, Blake, and Johnson said that they were going to file grievances with the Union, and Johnson volunteered that Todd had already filed charges with the NLRB. General Superintendent White told Todd that there was nothing he could do about the change in his work assignment, and that he would have to investigate the matter. He told the men that there would be no more harassment or threats, and that safety violations would not be tolerated, and that the men should report to work and they would be hearing from him.

When Todd and Blake reported to the platform to go to work, Robles told them that they had been moved off the platform and assigned to Crowley’s tower crew; they were to get their lunch and tools and report to Crowley. Crowley gave Todd and Blake new job assignments: he escorted them to individual stairwells in the tower, six floors below the platform and away from each other, and told them to clean the splattered concrete from the steel in preparation for painting. Todd said that this job was “bullshit.” Todd had his scraper tool with him and began scraping concrete; Blake said he did not have his tool with him, and Crowley brought him a makeshift tool, an angle iron, that he apparently found on the floor.

Todd worked for a few minutes and was becoming more and more aggravated about the situation. He finally decided that his being required to prep steel in the stairwells was the last straw, and went to Night-Shift Superintendent Gary Elrod’s office; Cook reported to Elrod. Crowley happened to be outside Elrod’s office, and asked Todd what he wanted to see Elrod about. Todd walked right passed him and entered Elrod’s office. Blake, Cook, and Elrod were already in the office. Todd voiced his various complaints, and said he was filing a grievance and a charge with the NLRB, and was not going to do the assigned work. Elrod said that Todd had been moved for reasons relating to production, that production was being served by his being moved, and that “safety was not an issue.”

#### *d. The discharge of Todd*

After the meeting in Superintendent Elrod’s office, Todd reported back to his assigned stairwell. At the break he and Blake were intending to go the gate to meet Business Agent Kesinger whom they had apparently called from Elrod’s of-

<sup>4</sup>In this regard, Todd testified that it was beneath him to clean the steel, as he was an “artist” who should just be required to paint it.

<sup>5</sup>Toeboards are wooden planks running along the lower perimeter of the swing stages, and are for the purpose of preventing tools and materials from sliding off the stages and perhaps injuring workers below.

fice. As they were waiting for Kesinger at the gate, Cook approached them and told them to get back to work, and said that he would bring Kesinger to them. Todd went back to the stairwell, and later Kesinger came to see him. After some discussion, Kesinger said that he would continue talking to Cook about the matter to see what could be done. According to Todd, Crowley continued to harass him whenever he stopped working and, when he stopped to smoke a cigarette, Crowley told him to get back to work or he would be forced to terminate him. Todd refused, replying that he would immediately go back to work only as a flier, the job he was hired for; but that he would not continue scraping the stairwells until he heard from Cook or Kesinger. At that point Crowley terminated Todd and escorted him off the property.

Todd testified that the only prior warnings he had received on the job were the two warnings from Cook: the one safety citation for working without his safety glasses, and the warning when Cook told Todd and all of the other painters that if production did not pick up they would be terminated.

*e. The testimony of Blake regarding the foregoing events; the discharge of Blake*

James Blake testified similarly to Todd regarding the various safety violations and the foremen's general disregard of the painters' safety concerns. Blake testified that in early August the painters, together with their shop steward, were permitted by Cook to hold a meeting in the job shack. Cook was in agreement that the men should have such a meeting amongst themselves, which was for the purpose of discussing their difficulties on the job. Blake explained:

We brought up the morale. It was so down that it was the type of job that you didn't want to wake up and go to work the next day. It got so bad that everybody felt that way. Being put in unsafe acts, that was getting real tiresome. It was not a fun place to work any more.

Blake denied that there was talk of a production slowdown at the meeting. After the crew meeting, Blake, Todd, and Bailey met with Foremen Cook, Robles, and Crowley, and discussed their concerns: safety, the morale of the men, being pushed too hard by the foremen, and not being issued clean overalls in a timely manner. Blake testified that production was also discussed, and that the men were trying to impress on the foremen their belief that, "[i]f you guys would lighten up on the [crew] and make this a more enjoyable place to come to work, production will pick up." According to Blake, Cook was in agreement with everything they suggested, and was "very humble" about it; he testified that, "[t]hey [the foremen] were in agreement, we were in agreement, everybody felt good." However, according to Blake, this only lasted about a week or so, as thereafter the foremen again began pushing them and failed to address their safety complaints.

Blake testified that on August 18, he had a conversation with Cook, who stopped him on the catwalk and asked him why safety was such a big concern with the men; he also inquired who was "going to safety." Blake told him that he didn't know, and added that the concern with safety is that "you guys are bucking production so hard that safety has become second." Cook said that Blake knew better than that, and got disgusted with him and walked off.

Also, according to Blake, Cook had a meeting with the crew that night. He talked about production and in "plain and simple" language said that if production did not pick up everybody would be fired.

Blake testified that prior to August, he and his swing stage partner, Steve Johnson, would occasionally be assigned the job of prepping steel and cleaning off dirt and rust while other painters were flying.

On the evening of August 20, after Blake and Todd had been assigned to prep steel on the platform, they again complained to Controls Manager Toole. General Superintendent Richard White was present at the meeting. Blake's testimony regarding this meeting is similar to the testimony of Todd. White told both of them not to worry about being harassed or fired and to give him 2 days to take care of the situation. They told White that they intended to file grievances and NLRB charges, and White said that, "[y]ou guys have got to do what you have got to do," but requested that they perform the work they had been assigned until he had checked out the matter and had gotten back to them. When they returned to work they were transferred to Crowley's crew, and were given the job of prepping steel in the stairwells at a location a block or so away from the other painters. Blake told Crowley that his tools had been stolen and he did not have them, and Crowley gave him a piece of angle iron he had picked up off the floor to use as a scraper.

After a short time, Blake went to where Todd was prepping steel and said that he could not take this type of treatment any longer; he told Todd to tell Crowley that he had gone to call the business agent. Blake went to the safety office and Toole permitted him to use the phone to call Kesinger. Kesinger instructed Blake and Todd to meet him at a particular gate. When Blake returned to where Todd was working, Crowley told him to get back to work. Blake replied that he and Todd were supposed to meet the business agent at the gate. Crowley got on the radio to Cook and said that Blake was refusing to work. Blake said he was not refusing to work, and that he would go to work after speaking with his business agent. Thereupon, Crowley brought him to Cook's office. Elrod was also present. There was some discussion about Blake not having his tools with him. Elrod said something to the effect that Blake was a troublemaker; Blake inquired whether it was because he got "safety" involved in the painters' complaints, and Elrod said no, that it was because they were slowing down production. Blake left the trailer and Crowley, who had pulled up in a truck, told Blake to go back to the stairwell and chip concrete. Blake refused, saying that he would go back to work after he met with Kesinger. Crowley got on the radio again and reported that Blake was refusing to work, and that he intended to fire Blake. Blake said that Crowley could not fire him as he was not his regular foreman. At that point Crowley fired him, and he was escorted out the gate. Crowley told him he was being fired for insubordination.

The next day Blake called White and told him he had been fired. White said that he was very sorry to hear that. Blake reminded him of the conversation the day before about there being no more harassment or anything of that nature; and White said it was out of his hands, that Blake had been fired by Vice President Jim Peterson. Blake disputed this, saying that he had been fired by Crowley. White said no, he had been fired by Peterson.

*f. The testimony of Business Representative Kesinger regarding the discharges of Todd and Blake*

Business Representative Kessinger testified that on August 20, when he came out to the jobsite in response to Blake's call, he met with Cook. Cook told him that Blake and Todd had been assigned to scrape paint in the stairwells because "they were slowing down their crew and that they were raising hell on the job site with the crew up above." Kesinger was permitted to investigate Cook's allegations by being allowed to randomly talk to the painters on the platform; they told him that they did not know anything about a slowdown, or "going after" a foreman or anything like that. After Todd and Blake had been fired for refusing to perform their assigned task, Cook told Kesinger that both men were going to be laid off at the end of the shift anyway.

Kesinger testified that at a grievance meeting on August 24, Rich White said that Crowley did not fire Blake, but rather that Jim Peterson had fired him before the shift started, and there was nothing he could do about the grievance at that step. At another grievance meeting on September 2, Elrod, the night superintendent, told Kesinger he had made the determination to fire Todd and Blake because he had discretely monitored their work on the platform and observed that they were trying to coerce the other members of the crew to slow down.

*g. The caution tape incident; the knife incident*

Employee Charles Shelton testified that on Friday, September 11, Crowley had asked him and John Ford to cross a caution tape to paint some pipe. According to Shelton, the area where Crowley wanted them to work was "unreal." Shelton testified that he "ignored" Crowley's instructions, because he didn't want to do that particular job. Later that evening Crowley came back up on the tower and wanted to know why the pipe had not been painted. Thereupon, Shelton immediately went to get Union Steward Bailey to inspect the assigned work area. Crowley advised Bailey that the area was safe and that a "safety person" had given permission to cross the caution tape and paint the pipes. Bailey apparently gave his okay and then Shelton and Ford proceeded to paint the pipes as originally instructed by Crowley. Shelton testified that he did not tell Crowley that he was refusing to do the job because he felt it was unsafe; apparently, he just ignored Crowley's instruction.

Shelton said that immediately after the toolbox meeting on Monday, September 14, he overheard Crowley ask Ford if he was going to file a grievance against him about the caution tape incident. Ford, according to Shelton, said he was going to do what he thought was right. Then Crowley asked Shelton the same thing. Shelton replied, "Brian, let's just forget about it." Then Crowley asked again, saying, "Are you going to file a charge against me, god damn it?" Shelton heard a "click," and saw that Crowley was holding a knife in his hand. Shelton walked away, and the next thing that happened was that, according to Shelton, "I had went down to the work box to get my equipment to go to work, and I told John Ford what had happened, and John Ford had told Steve Johnson." Immediately thereafter, according to Shelton, "I got my equipment; I went back up there; and I went to work. Then after lunch they called me down to Mike Cook's office and asked me what happened." Asked whether

he talked to any employees other than Ford before he was called into Cook's office, Shelton answered, "Not that I can recall." Thus, from the scenario testified to by Shelton, it appears that Ford related the incident to Steve Johnson, who in turn advised Bailey.

Shelton did not testify that he had intended to do anything about the alleged knife incident.

Later that night, Shelton was called into Cook's office. Bailey and Crowley were present. Shelton was asked to relate what had happened. Crowley denied that he had threatened Shelton with a knife, and added, according to Shelton, he would not hurt Shelton because he was the best worker he had. Shelton testified that he has always gotten along well with Crowley.

Thereafter, Shelton was assigned to work the day shift in order to keep him away from Crowley. He was terminated several days later, *infra*, because, according to Jim Alger, who became swing-shift superintendent on August 31, he was a troublemaker.

John Ford testified to the incident regarding the caution tape. After the Monday toolbox meeting at which the types of caution tapes were discussed, Crowley happened to stop him and ask if Ford was going to file a grievance against him. Ford said that he was not even thinking about it. Shortly thereafter, Shelton told Ford that Crowley had asked him whether he was going to file a grievance against him, and said "something about he was going to stab him if he was going to file a grievance against him." On September 17, Ford was made a shop steward; Shelton was also made a steward. Also on that date Ford filed a grievance over being reprimanded by Crowley for seeking guidance from Shop Steward Bailey about crossing the safety tape. On September 18, Cook handed Ford and Shelton termination notices, *infra*. Crowley said that they were laid off because "Austin was tired of this stuff." His termination notice states that he was fired for "willful misconduct on the job."

Shop Steward Joe Bailey testified that on Friday, September 11, Crowley admonished him over the caution tape incident. Crowley told Bailey that it was Crowley's job to instruct the men, that Bailey was not to have anything to do with it, and that he should not bother his men when he tells them to do something. Crowley repeated this to Bailey on Monday; according to Bailey, Crowley was abusive and it was "aggravating" the way he was speaking to Bailey. On At the toolbox meeting on Monday, September 14, the difference between the yellow caution tape and the red "Do Not Enter" tape was discussed. The men were told not to proceed through "Do Not Enter" ribbons.

Bailey asked Cook why Shelton and Ford had been reprimanded by Crowley, who had "chewed them out" for coming to see Bailey. Bailey did not recall what Cook said. He discussed another issue with Cook, apparently at the same time, as follows:

I was told that Brian [Crowley] offered a guy \$200 to lie about me to get me fired, to have me say that there was a work slowdown, because if I tell [the men] to slow down, it's a breach of the contract. But no way did I say that.

Also on Monday, Shelton told Bailey that Crowley had just pulled a knife on him. Bailey testified that Shelton said:

He [Crowley] pulled a knife on me. . . . he walked up to me, and he said 'I'm in trouble with the NLRB because there's a grievance you guys are going to file.' And he said that he stood back in a threatening manner with an open blade with him—at him.

Bailey reported this to Cook, and Cook immediately summoned Crowley to a meeting in Cook's office. Also, Shop Steward Myron Peterson was present. Bailey said in a polite way that he was not insinuating anything, but that he had been told by Shelton that Crowley had pulled a knife on him. Crowley began swearing at Bailey, and said, 'I'll kick your ass,' and repeated that he would take Bailey in the parking lot and kick his ass. Cook ended the meeting after the two began arguing. Later, Boeing security arrived and, according to Bailey, "with a bullhorn and lights a-going they were hunting for a guy with a knife." Bailey later learned that Steve Johnson had called Boeing security.

#### *h. Additional testimony by Bailey*

In addition to the foregoing testimony by Bailey, he testified that as shop steward he was to get permission from the foremen in the event the painters had a work-related matter that required his attention. He spoke with Cook regarding a number of complaints. Initially, the complaints concerned lack of proper ventilation. Later, he discussed other safety matters with Cook.

Bailey testified that at a crew meeting in early August, when Cook was "getting in trouble" for lack of production by the crew, the following was discussed:

That we didn't need so much supervision, kind of bird dogging by the foremen just standing there watching us all night, you know, instead of having to do something else. They would always just stand there and watch us, you know. And, you know, you don't need any pressure when you are doing this type of work . . . we would help them all we could by trying to police ourselves and making sure that everybody pulled their own weight. You know, if we seen somebody that wasn't pulling their own weight, that we would take care of it for them.

As a result of this meeting, Bailey, Todd, and Blake presented the painters' proposal to the foremen, and they agreed to it. Thereafter, the work proceeded to be performed in a timely manner without any problems, but this did not last long.

Bailey reported to Cook that painters were not properly using their safety lines, and Cook told him that the men should not be doing that.

Bailey did not testify to any conversation with Johnson regarding the knife incident. He did not even know that Johnson was the person who called Boeing security.

Bailey was ill and not at work from approximately August 14 to 21. Apparently, according to the testimony of Toole, he had been hospitalized for a heart condition. Prior to this time he was spraying catwalks from the rolling work platform. After August 21, when he returned to work, he was assigned to work in the stairwells where he was to "scrape concrete; scrape paint; sweep; get it all clean." Customarily, when such work was done, the whole crew would be as-

signed to do it. However, Bailey was working alone. Upon completing this work, he was assigned to prepare drywall and sand concrete ceilings in the bathrooms; he had to wear a respirator for some of this work. This work lasted a week or two. Bailey did not state what his work assignments were following this 2-week period.

On September 18, James G. Peterson, vice president and program manager of the Respondent, sent Kesinger the following letter regarding Bailey:

During the last several weeks, Mr. Bailey has been interfering with Austin's foremen in their performance of their duties and giving direct instructions to workers, stopping painters from doing their assigned tasks, soliciting dues from workers, leaving assigned work areas without permission from his foreman and in general disrupting Austin's operation.

The steward's function should be your eyes and ears on the project and should not interfere with the work functions that are being performed. He is expected to work a full shift and not to leave his assigned area.

We would appreciate it if you would so direct your stewards as to their duties and this letter is a notification that if it continues, we will have no choice, but to terminate Mr. Bailey.

Bailey testified that as a result of the letter he "stopped doing anything unless the guy's job was at stake. Then I would put my job on the line for it." Regarding the solicitation of union dues, Bailey testified as follows:

The financial secretary asked me to personally go see these guys and tell them that they were going to get kicked out of the union unless they paid their dues. I was just trying to save the guys' darned jobs. So rather than me take the time and go do it, I asked Jose Robles—he's in the union; he's supposed to be a brother—I asked him if he would go see these individuals so I could keep working. And he said that yes, he would.

#### *i. The testimony of Steve Johnson; Johnson's involvement with the knife incident; and Johnson's discharge*

Steve Johnson described the work of the fliers as "miserable," as they were working near the ceiling after the building had been baking in the sun all day, and the temperature would be from 90 to 105 degrees. Further, the men were suited up in a full set of coveralls, gloves, heavy boots, a cloth spray hood, a full-face respirator, and apparently, a body harness. They were paid \$19.24-per-hour straight time, regardless of whether they were flying or scraping paint in the stairwells.

After the August meeting, according to Johnson, when Cook had agreed, in effect, supervise themselves in exchange for increasing their production, things were satisfactory for about 1-1/2 weeks. The foremen "kind of laid off and didn't scream and yell at us. We got the work done for them." After the platform had been moved to a part of the structure where the area above the platform was difficult to paint, the men were unable to complete the job in time prior to the next scheduled move of the platform. Cook, according to Johnson, said that the men had failed to uphold their agree-

ment, and had dogged it, and accused them of deliberately failing to complete the work on time. This caused things to revert to the way they were prior to the agreement between the painters and the foremen.

Johnson testified that on Monday, September 14, near the beginning of the shift, apparently about 4:15 p.m., Shelton and Ford came up to him. Shelton said that Crowley had pulled a knife on him: that Crowley had stepped back with one foot, and pulled a knife out of his pocket, opened the blade, began to twirl it in the air, and asked Shelton if he was going to file a grievance against him. Upon hearing this, Johnson told Shelton to go talk to Shop Steward Bailey about the matter, as Bailey should be the one to handle the situation. At lunch time, which was apparently some 6 hours later, about 9 or 10 p.m., Johnson was told by Bailey that during a meeting in Cook's office, Crowley had threatened to take Bailey out into the parking lot and kick his ass. Johnson asked Bailey what was being done about the knife incident, and Bailey said that Cook was "playing it down" and just told Crowley and Bailey to calm down as they were getting too excited. Johnson was perturbed that Crowley had not been disciplined in some manner, and told Bailey that if one of the painters had threatened to kick a foreman's ass, the painter would be "down the road." Johnson also surmised that Cook was trying to cover up the knife incident. He told Bailey that he had a friend at Boeing, a painter, and that he would call his friend and ask him to send over Boeing security. Johnson did so, and Boeing security arrived about 5 or 10 minutes after he made the call.

Johnson testified that he thought the situation was serious enough so that it had to be handled right away because somebody might get hurt, and that somebody in authority, other than Bailey, needed to handle it. Further, it appeared that Austin was trying to make "too light of the situation." Asked why he felt that the matter could not be handled by the persons directly involved, Johnson testified:

Well, viewing the people that were involved—Joe's [Bailey] a nice guy, but he is not real good at assessing situations and coming up with what I feel would be, sometimes, the smartest decisions. He is sometimes easily flustered. And Chuck [Shelton], of course, was pretty upset. I didn't think he was able to make any real smart decisions, either.

Joe, it appeared, had failed to be able to remedy the situation by going down and discussing it with the parties involved. It seemed to have escalated to him being threatened. And he came up flustered and not knowing what to do, either, other than [saying] "I guess I just need to go and talk to my business agent."

Responding to a question about his opinion of Crowley, Johnson stated:

There was a marked change in Brian's attitude toward the rest of the men when he got his red hat, which was the point where he became a foreman. Prior to that, he played like one of the guys, one of the crew. But when he got his red hat, my opinion of him at that particular point changed because his attitude toward us changed.

My opinion of him, to be frank with you, was that he was a back-stabber. He was out for number one; and

if others got hurt along the way or he had to do things that weren't quite ethical, why, he would do it. And that's what—my opinion of him became quite guarded. He was somebody to be careful of.

The next day, September 15, Cook said that he wanted to see Johnson in his office. He terminated Johnson at that time, stating that he had been instructed not to tell him why. Then Johnson was escorted off the property.

j. *The testimony of Sorter and Smith; the September 18 terminations of Shelton, Ford, Sorter, and Smith*

Gary Sorter was hired in June. At the beginning of August, he was working off the platform with another painter and the job was "scary" so the men went to talk with Robles to see if they could devise an alternate rigging to be more secure. They came down and told Robles that they would like to do it a different way. Robles said that the existing rigging was perfectly safe, and they should go back up and perform the work.

Some time before September 18, Crowley saw Sorter looking at his watch; he was beginning to clean up about 5 minutes before lunch, and told him to "Go talk to Mike and tell him that you were standing around." He did so and Cook told him to stay busy and productive.

Daryl Smith began working for the Respondent in February. He has been friends with Robles for a long time, and considers him to be a good friend. In February he was told by Robles to paint a wall, and was concerned because there was no proper rigging, and no way to rig up a safety line so that he could be tied off. Smith complained to Robles, and Robles went to Cook who told Smith to either do the work or he would get somebody else to do it. Thereupon Smith complained to Bailey, and Bailey and Cook worked out an agreement whereby Smith could run a rope in a way that would enable him to tie off. There is no showing that Smith was reprimanded or harassed as a result of taking his complaint to a union steward.

On one occasion when they were removing the curtains from around the platform, Smith was the only person standing there who happened to be wearing a safety harness. Robles told him to walk out on the steel and remove the curtain from some obstruction that caused it to hang up. Robles told him to tie off to a piece of conduit. Smith testified that he did not want to do it, but "all the guys were there; they ribbed me; so I just crawled over the safety barrier out on the steel; I went out there and took the plastic off the light stand; and I crawled back onto the platform." It is permissible to walk steel as long as the individual is tied off.

There was one safety meeting, according to Smith, where Cook told the painters that if production did not pick up he was going to fire the whole crew and get people in there who would get the job done.

Smith testified that in September, Robles told him "pretty much on a daily basis" to "get the guys to drop their grievance against the Austin Company or we would all be fired." Also, Robles asked Smith "every day" to get Shelton to drop his "charges" against Crowley or "they'd be getting fired." Robles, according to Smith, was concerned that Smith would lose his job, and wanted Smith to "do something so that I wouldn't." Robles asked him to get the guys to drop their grievances and safety complaints, and said that



they had received permission from "back East" to go ahead and fire the whole crew and to hire people who could do the job.

Toward the end of the shift on September 18, Robles told Sorter, John Ford, and Daryl Smith that he had a little task for them to perform on the ground. They were taken into Cook's office and given their separation notices, stating that they were being laid off because of "Willful misconduct on the job." Shelton, who had been transferred to the day shift in order to separate him from Crowley because of the alleged knife incident, received a similar notice that day.

A "Determination Notice" from the state Employment Security Department states that Smith, who was discharged on September 18, was terminated for the following reasons:

Low production and disrupting others. Your employer reported you were observed talking to other workers and the crew had been talked to about low production and the need to improve.

### 3. The Respondent's defense

#### a. *Testimony of Controls Manager Brenda Toole*

Controls Manager Brenda Toole is a safety engineer; she is in charge of safety, quality assurance, and scheduling at the project. At times material herein there were four full-time safety engineers in the safety department who reported to her on the day shift, and one safety engineer on the second shift.

Toole testified that the Respondent puts safety above all else. All employees on their first day of work are given a safety orientation which takes from 1 to 1-1/2 hours; and they are issued several items of safety equipment. In addition, there is a regular Monday toolbox safety meeting each week at which a safety topic, written out by a safety engineer, is discussed by a foreman or, in some cases, by a superintendent who does not give the foreman advance notice that he will be attending the meeting. The employees sign an attendance list. The safety topic of the week is usually a current problem, taken from a safety complaint log, that someone had brought to the safety department's attention during the preceding week. Minutes of the prior meeting are read at the next meeting, and the men are advised as to the disposition of their safety concerns.<sup>6</sup> Employees are encouraged to raise any safety issues at the toolbox meetings. Also, at these meetings the foremen are to note on a weekly complaint log any safety problems raised by the men. The complaints are recorded and the corrective action taken is also noted on the logs, which are posted on safety bulletin boards, so that the employees can learn what the complaints have been and what corrective action has been taken. Further, employees are encouraged to come to the safety department any time during the week with safety complaints. No safety complaints, according to Toole, are considered unwarranted; every safety complaint is investigated and corrective action is taken as expeditiously as possible. In cases where confidentiality is necessary or requested, the safety department does not disclose the source of the information, and the indi-

vidual or group of individuals making the complaint is personally advised of the corrective action.

Toole testified that she heard of very few safety related complaints from December 1991, when the painters started on the job, until August 1992, when overtime work was ended. Apparently from December 1991 until July 1992, a period of about 8 months, the painters had been working unlimited overtime; thereafter, they worked six 10-hour days until August 9, when overtime work was discontinued and they began working a 40-hour week.

Toole testified that on August 11, Union Steward Joe Bailey told her that he had some serious concerns. His primary concern was that the Respondent had "C list" painters working on the rolling platform, and that these people were inexperienced and therefore posed a safety hazard. Explaining, Bailey told her that "C list" painters are new union members who became members as a result of a newspaper ad placed by the Union in order to obtain additional painters after the Union's other hiring hall lists had been exhausted. While these painters were obtained by the Respondent through the hiring hall in accordance with the union contract, Bailey complained about the extent of their experience and maintained that the Respondent was responsible for insuring that only experienced people be assigned to work on the rolling platform. Toole told Bailey that there should be no concern, as the Respondent provided onsite training for such painters; however, she said she would check into this. Bailey did not provide her with any names of painters whom he believed to be unacceptable, but merely described them as C list painters.

On August 14, Safety Engineer Russ Evans, one of Toole's subordinate safety engineers, entered Toole's office with Kevin Todd. Safety Engineer Steve Lotz was present for part of the ensuing meeting—he was in and out of the meeting twice. According to Toole, Todd began by stating that he had some very serious safety matters he wanted to discuss. He said the hydraulic man lifts were leaking hydraulic fluid, and that the hydraulic boom on one of the lifts was not working properly; he did not believe that the daily inspections were being made or that there was appropriate maintenance on this equipment. Toole reminded him that the painters were required to do daily walk-around inspections on this equipment, and Todd said that some painters were and some were not making such inspections. Toole said she would investigate this further, and would conduct a remedial training class, as a reminder, for all the people using the equipment, and would have one of the subcontractors come in and do a more thorough inspection of the equipment on a daily basis.

Todd went on to say that he had other concerns, and reiterated Bailey's concerns about the inexperienced C list painters on the rolling platform. He said that he would prefer to have them removed, but that they could work elsewhere on the project. He said that there were A and B list painters at the union hall who were not working and were not eligible for rehire on the job while C list painters were working on the rolling work platform. He explained that Mike Cook disliked some of the painters on the A or B list, and had terminated them and made them ineligible for rehire. He said that Cook was not a good foreman, and that he had some real concerns about Cook. He said that he did not believe that Mike Cook, Lonnie Cook (another foreman who was Mike

<sup>6</sup>The Respondent introduced the minutes of each of the toolbox meetings from May through September. The minutes reflect no safety complaints raised by the painters.

Cook's father), Jose Robles and Brian Crowley were enforcing or implementing many of the safety procedures. Then he said that Mike Cook and Lonnie Cook had only joined the Union for this particular job, and they were not pronoun; and that he, Todd, would be able to get more production out of the workers than they were getting. He also said he had serious concerns about Jose Robles, because Robles could not read or write or fill out time sheets, and that someone else had to do that for him. Toole said that these latter concerns were not safety issues, but that she would pass these on to her boss, James Peterson.

Toole asked Todd if he had any further concerns, and he said that he did. He addressed the hydraulic Genie lifts which were used on the rolling work platform, saying that the outriggers were not always being used on those. Toole asked him why, and Todd explained that sometimes the lifts could not be placed in tight spaces or corners with the outriggers attached, and that sometimes the outriggers would be misplaced as the Genie lifts were not used on a regular basis; and that when the men went to look for them, Robles would tell them not to bother with the outriggers and to get on with their work. Toole said that she would insure that there were outriggers for all such equipment and that if the men were going to be working in tight spaces where the outriggers could not be utilized, then she would find some other safe way to get the men up in the air, even if it necessitated building another scaffold or platform.

Todd mentioned three specific concerns with the swing stages: that the toeboards were not always in place; that transfer chains were being dropped from the beams onto the rolling work platform;<sup>7</sup> and that rope grabs were becoming turned and twisted. Regarding the toeboards, he said that sometimes they get misplaced or broken, and a supply of extra ones were needed on the site. Toole said she would provide additional training for the painters, and would replace all of the broken toeboards, and she would bring Spider Staging (the company that manufactured the swing stages) to do more inspections on the transfer chains and rope grabs, and that "we'll replace and repair" whatever was needed to assure that the equipment was safe.

Todd, according to Toole, said that there was one other concern, and that was that the painters were basically only cleaning the steel prior to painting when the paint manufacturer was going to be on the site. Toole said that would be easy to investigate as she was responsible for quality assurance, and would have her people check to see that the steel was being cleaned before it was painted. Toole asked Todd if there were any other concerns, and he said that other painters had concerns, but that was not able to speak for them at that point. Toole asked why they did not come in and talk to her, and Todd said they were afraid to do so. Toole then asked Todd to have them write down their concerns. He said he would do that, and would bring them to her at the beginning of the following week, but added that the men would not sign their names to the complaints. Toole told him that she did not need their names.<sup>8</sup>

<sup>7</sup> Transfer chains support the swing stages and are subject to stress damage if dropped from unreasonable heights; they are to be removed by means of the Genie lifts.

<sup>8</sup> Several days later, Todd brought the written complaints to her. Most were simply a reiteration of Todd's complaints.

Todd told Toole that the safety department needed to do something about these concerns immediately. Toole said that she needed the better part of a week to address all these things, but that she would begin immediately, and do what was required. Todd then said, according to Toole, that if she did not take care of these matters he would do whatever he could; that he would contact the NLRB, the Union, and OSHA, and that he would phone the Boeing representative and let them know what was going on. He further said, according to Toole:

He also went on to state that he had other ways of affecting our work and that he could cause trouble. He told me he was an agitator and that one of the things that he would do if we didn't correct these things was slow the work. And he said the way in which he would do this is whenever the foremen or superintendents weren't on the rolling work platform, that he would have all of the people come down out of the stages; and they would just stand on the platform. They wouldn't work unless there was any supervisors up there.

A second meeting was held on August 19. Those initially present in addition to Toole were Todd, Jim Blake, and Safety Engineer Steve Lotz. Also, after about 5 minutes, at the request of Todd, Richard White was also brought in; and after about 10 minutes, Steve Johnson came in. Todd went through some of the same concerns that he had mentioned to Toole during the first meeting. He also addressed some new issues, such as painters walking the steel. Toole said that for the most part the painters should not have to do that because much of the steel could be accessed by means of ladders or lifts from the rolling work platform. Todd said that it was his primary goal to get rid of Mike Cook and Lonnie Cook because they were not pronoun and had just joined the Union for this particular job; and that he was better able to run this job. White told him to go back to work and do his job, and that he would talk to Peterson about these things. Toole reported to him what she had accomplished since his first visit 5 days earlier: that a training session for the painters on man lift equipment had been held on Monday, August 17;<sup>9</sup> that on August 18 she brought in a representative of the Spider Staging Company who gave a training session which was attended by every worker on the rolling platform; and that in addition to the training session, the Spider Staging representative had safety inspected all the stages. Further, because of all of the questions asked at the first meeting, another training session for the swing stages had been scheduled for August 25.<sup>10</sup>

Toole asked Todd whether he was satisfied with what was being done, and Todd said that he was, but that his primary goal was to get rid of Mike Cook; he did not want Cook there because Cook was not implementing the safety program. At this point Blake spoke up and said that Crowley had made some derogatory remarks against him, and that all

<sup>9</sup> Toole testified that at this session some of the painters admitted that they disconnect the safety devices on the Genie lifts because it enabled them to operate them without the outriggers. They were told that if the outriggers prevented them from getting into a particularly tight spot they should not disconnect the safety devices, and another way would be found to do the work.

<sup>10</sup> This session was held as scheduled.

he wanted was to be left alone to do his work. The meeting lasted about an hour, and after White left, Todd reiterated that he could cause trouble and would slow the work down. Lotz was there for the whole meeting. Todd also said he had been in contact that day with the NLRB, that he had written up charges, and that NLRB representatives were just waiting for him to call and confirm that he wanted to proceed with the filing of the charges.

*b. Testimony of Safety Engineer Steve Lotz*

Steve Lotz has been a safety engineer for the Respondent for 5 years. The primary responsibility of safety engineers is to develop and implement safety programs for the job site, and to provide safety training for all employees, supervisors and foremen. The safety engineers also write the weekly script for the toolbox safety meetings that the foremen hold with their crews. Also, they hold byweekly safety meetings for the Respondent's foremen and superintendents as well as for the foremen and superintendents of the subcontractors.

Lotz testified that there were never any safety complaints from the painters from December 1991 through June 1992 when Russell Evans replaced Lotz as safety engineer on the second shift.

Lotz was present for the entire August 14 meeting. According to Lotz, Todd voiced his various safety complaints, *supra*, and then started talking about Mike Cook. He said the men were not happy because Mike Cook and Jose Robles were incompetent and were not qualified to be foremen, and that they were not prounion. He said something to the effect that they were just in the Union for this job, and they should not be foremen because they were not "regular union people." He said the men were not going to be happy until Mike Cook and Jose Robles were no longer on the job, and that, "I'm slowing down work up here, up on the platform; and I'm trying to get everybody else to do the same; and we're not going to get anything accomplished until they're gone."

Lotz had a conversation with Todd on August 19, out in the work area. Todd said, according to Lotz, that he was not happy with the progress that Toole and Lotz were making and that his complaints had not been addressed; that Cook and Robles were still foremen; and that he needed some action now or he was going to sue the Company and take them for everything they were worth, or words to that effect. Lotz replied there was nothing he could do about Todd's concerns with Foremen Cook and Robles, as his job was to deal with safety matters; however, he invited him to come to work early the next day and again meet with Toole to discuss what had been done about Todd's safety complaints.

Lotz also attended the August 19 meeting. Shortly after the meeting started Lotz was called on the radio, and left. He returned about a half-hour later. He recalled that the painters were saying something about Cook and Robles "having to go" before they would be satisfied. Todd, according to Lotz, did not seem to be upset with Cook and Robles because they allegedly were not doing a proper job in enforcing the miscellaneous safety complaints he had; rather, Todd was upset because they were previously non-union, and he felt they were incompetent. Superintendent White said that there was no way that Mike Cook or Jose Robles would be thrown off the job. He told the men to go out and do their work and give the safety people a little time

to try and address their concerns, and to keep calm and not to do anything rash. The meeting ended and, according to Lotz, the men were afraid that they were going to be a little late to work.

Lotz testified that at about 7 p.m. on August 20, Blake passed Lotz in the building and said that he was going to meet his business agent, and that in an earlier meeting Gary Elrod had told him that "safety was not important, production was important." Blake said that Lotz needed to do something about that. At that point Crowley drove up in the pickup truck and politely said, "Jim, go back to your work station and we'll get the BA and bring him in to talk to you there." Blake said no, that he was going to meet the business agent at the gate. Crowley politely asked him three times to return to his work, and Blake refused and "went stomping off toward the main gate." Crowley drove after him, and about 3 minutes later Lotz heard Crowley on the radio tell Gary Elrod that he was firing Blake for insubordination because he refused to go back to work. Later that night he heard Crowley call Elrod again and report that he was firing Todd because he was refusing to work.

*c. Testimony of Safety Engineer Russell Evans*

Russell Evans became employed as a safety engineer for the Respondent on June 22, 1992, and worked in that capacity until he left on October 1, 1993. He monitored safety activities on the job, and his practice was to walk about the site, not telling anyone when or where inspections were being conducted. He received no safety complaints from the painters from June, when he started, until August 13, other than one instance when Todd approached him at the beginning of August about filling one of the eyewash stations; it was the laborers job to maintain the eyewash stations.

On August 13, Todd and Bailey approached Evans on the rolling work platform. Bailey said that he had been required to go up in the Genie lifts without outriggers. Todd mentioned that he did not want any of the foremen to hear the conversation. Evans told Bailey that he did not want the men to go up in the Genies without outriggers. Bailey said that he did not want the foremen to know who was reporting these things. Todd made a number of other safety complaints: a grab rope that was not functional; walking steel without being tied off when they were placing the plastic containment curtain around the platform; and that C list painters were regularly walking the steel beams without being tied off. Evans remained on the platform the rest of that night, looking for safety violations by the foremen or the employees. He asked Robles whether he had been using the Genies without outriggers, and Robles said that he had not. He saw no violations that night. Todd again approached him later that night and wanted to discuss all the various safety issues further, but at a location that could not be observed by the foremen. He said that Mike Cook would ask for the names of painters reporting such safety violations. He also said, according to Evans, that "he was an instigator, an agitator on the job, on job sites, not specifically at Austin; and that he was known for this activity." Evans invited him to a meeting with Toole the next day where the matters could be discussed.

Evans attended the entire meeting on August 14. His recollection of the meeting is "somewhat minimal." Todd discussed a number of safety items and said that Cook was

incompetent as a painter foreman, and that he should be fired. He also said that Cook was not a union man. He did not recall whether Todd said that he wanted to be the boss on the job, but he was very unhappy with Cook's management of the job. There may have been some mention of overtime being taken away, but Evans does not recall whether it was at that meeting.

After the meeting ended Evans went back up to the rolling work platform. Bailey approached him and said that Cook had forced him to go up in a Genie lift without outriggers. He said that if Evans addressed this problem with Cook, Bailey did not want his name mentioned. Evans approached Robles and asked if he had been using Genie lifts up against the walls or a beam without outriggers: there was a Genie lift up against the wall that was missing an outrigger. Robles said that this was necessary in certain situations. Evans told him not to do that until after Evans could call the manufacturer of the Genie lift and find out if this was permissible. He called the manufacturer the next day and explained the situation; he was told that it was safe and permissible to use the Genie lift without outriggers when it was up against the wall, but not when the lift was merely up against a beam; but that from a liability standpoint outriggers should always be used. Evans then told Robles not to use the Genie lift at all without all the outriggers.

Evans testified that Todd also made some safety allegations concerning Crowley. Further, he said that Mike Cook and Lonnie Cook, and "basically management" did not properly run the painting operation and should be gotten rid of. He said the employees were not treated right on the job and were monitored every time they went to the bathroom. He said the men did not have the proper equipment or attire, and basically that they wanted to be treated like human beings. Evans testified that all the safety matters were looked into by the various safety engineers, who were all given specific assignments and told to investigate complaints. No safety violations were discovered.

Evans testified that while Todd did bring up various safety matters, it seemed like he was attempting to use them as more of an excuse to get rid of Mike Cook. Todd, according to Evans, said that Cook did not even know how to paint, that he was not competent, and that he was not a union man. Evans testified that his job was just to take care of safety concerns, and he did not attempt to figure out what was going on or to get involved with the "politics" of the job.

#### *d. Testimony of Foreman Jose Robles*

Jose Robles worked for the Respondent from December 1991 until May 1993. He was a foreman on the rolling work platform. He spent about 50 percent of his time on the platform, and 50 percent on the ground getting equipment for the fliers and for the pot tender who prepared the paint on the platform. Thus, he had a number of tasks to perform on the ground: getting rags, electrical cords, face guards for the painter's masks, plastic bags, and rollers and brushes, and fixing hoses and pumps that were broken. Robles had 11 employees on his crew, 8 flyers who manned the four swing stages, 2 men on the ground who painted, and 1 pot tender who mixed the paints and took care of other items.

On August 10, Robles was present during a lunchtime discussion that his crew was having. He was about 6 feet away from the group. Also, all of Brian Crowley's crew who were

working on the tower were present. Specifically, in addition to the rest of the men on the two crews, Kevin Todd, Jim Blake, Steve Johnson, Gary Sorter, Chuck Shelton, and Daryl Smith were present. Prior to August 10, the overtime work of the painters had been cut. Todd stated at the meeting, according to Robles, that the men wanted their overtime back and were going to slow down the work on the platform in order to accomplish this. There were no complaints about safety;<sup>11</sup> rather, the men said that they would do anything to get their overtime back. Some of the fliers, including Steve Johnson, said they were going along with Todd and Blake, and intended to slow work down on the platform. Todd said they were not going to do what that "ass hole" Cook told them to do, but that they would follow Robles' instructions. After the meeting the men took the elevator downstairs and spent more time talking about the situation and smoking cigarettes. The break was over at 9:30 p.m. and, according to Robles, they did not come back up to the platform until about 10:15 p.m. Then they proceeded to slow down and not get on their stages; instead, they cleaned their masks, cleaned paint off their shoes and boots, and "stuff like that."

Robles reported to Cook what was going on, and Cook came back up and had a talk with the men. Robles and Crowley were present. Cook told the crew that overtime had run out, and that it was not Austin's fault. Further, he told them to get back to work or there would be some changes made and he would replace them.

After that August 10 meeting, according to Robles, the work did not pick up that much, and the men slowed down the job by not painting as quickly as they had in the past. He would continually tell the men to "get going" and pick up the work, and spoke with Cook about the matter on a number of subsequent occasions.

In mid-August, Cook instructed Robles to remove Todd and Blake from the stages and put them to work on the platform painting I-beams. This did not work out that well because, according to Robles, Todd and Blake were busy taking cigarette breaks, and would not remain in their work areas. Robles caught Blake smoking by the curtain when he had been told not to smoke cigarettes on the platform. In addition, Todd was not where he was supposed to be and Robles went to look of him and found him over in the corner smoking a cigarette. Robles went down and reported these things to Cook, and Cook instructed him to transfer Todd and Blake to Crowley's crew on the ground.

According to Robles, the slowdown continued well into September, until after Sheldon, Ford, Sorter, and Smith were terminated. Robles testified that the men continued to slow down production on the platform, and there were even times when he caught them lying down on the stages smoking cigarettes. Prior to the discharge of Johnson, it appeared to Robles that Johnson, who had been very friendly with Todd and Blake, and who had been Blake's stage partner, had taken over as leader of the group and was creating more problems on the platform for Robles' crew. Thus the men continued to slow down the work; in particular, Johnson slowed things down by taking excessive and lengthy bathroom breaks, failing to get on his stage in a timely manner, and taking too long for breaks and lunch. Smith, Ford, Sorter,

<sup>11</sup> Robles testified that while there were a few safety complaints from the crew, he took care of them promptly.

and Joe Bailey were involved in the slowdown, and seemed to be following Johnson's lead. During this time, Robles continued to advise Cook of the problems he was having with the crew.

According to Robles, production picked up after the men were terminated. During the slowdown the men used about 100 gallons of paint a night; after the discharges in mid-September new painters were hired from the hall and work "picked up fantastic"; the new crew used about 300 gallons of paint each night.

On September 14, the night Boeing security was called, Robles had been trying to locate Steve Johnson and was told that he had gone to call Boeing security. Later, after Boeing security had arrived and had asked to speak with Johnson, Robles was instructed to bring Johnson from the platform to meet with the security officer. As they were walking together, Johnson said to Robles, "I'll get even with Brian Crowley; and I called security on him; and he's just as guilty as . . . pulling a knife." Johnson said that he was getting even with Crowley for laying off Blake and Todd, and "for railroading them."

Robles testified that a few days later he had a conversation with Chuck Shelton on the platform. Shelton, who had been appointed to the position of union steward, said that the business agent had made him a union steward so that he could not be fired.

*e. Testimony of General Foreman Mike Cook*

Mike Cook has been the painting general foreman from December 1991 to the present date, and has been responsible for hiring and firing the painting crew. He has been a union member for 14 years. The job of the second-shift painters was to work in the high bays on the rolling platform and to paint in the tower portions of the buildings. High bay painting was not done of the day shift because it would interfere with the activities of the other crafts. According to Cook, there were always a number of painters who were capable of doing a proficient job on the swing stages, and he and Robles would keep an eye on the new fliers, and confer with their more experienced partners, to insure that they were competent and comfortable with the work. Indeed, two painters had been moved from the high bay because they said they were not comfortable with the work; also, Joe Bailey was removed from a stage as he was "incredibly slow" and seemed kind of unsure of himself.

At each toolbox meeting on Monday of every week Cook would ask whether the men had any safety complaints or concerns they wanted to talk about. This was a mandatory meeting for all painters. There were a few safety complaints, and these were taken care of right away. According to Cook, the men generally did not like to wear their gear: the body harnesses were heavy and they were constrictive. He encouraged the men to come and talk to him about any problems, but testified that no one complained to him about safety matters, or said that Crowley and Robles had instructed them to ignore the safety procedures for the sake of production. Rather, according to Cook, the foremen had to constantly talk to the men about wearing their safety harnesses, and would catch painters trying to walk steel without wearing them or being tied off. Also, the men had a practice of using the Genie lifts without outriggers. Cook was able to observe the men when no one knew that he was watching, as the work

area was extensive and there were many vantage points that were not out in the open.

Prepping, according to Cook, constitutes a very large percentage and a very important part of the work. If the prepping of the steel is not adequate, then paint failure may occur: the paint could crack, or peel, or the surface could rust.

In February, the painting crews were working unlimited overtime. They worked 10 to 12 hours or more 6 days per week. On July 6, this was reduced to a maximum of 60 hours per week, at which point Cook told the men that the workweek would be limited to 60 hours, and the platform would move regardless of whether the division was completed or not. Cook testified that most of the men were pretty unhappy about the reduction of overtime, and that some had told him that the only reason they had accepted a job with Austin was for the extra money to be made by working extensive overtime. The 60 hour per week maximum began on July 6, but the painting in the first division of this building was not completed by July 15, as scheduled. Rather, according to Cook, it took the men 20 hours to hang the containment curtain around the platform, while the same job had taken only 10 to 12 hours on the last section of the preceding building. In addition, each swing stage completed only two bays per day in the new building, as opposed to five bays per day that had been previously painted by the men in a building of similar difficulty.<sup>12</sup> Cook testified that the men should easily have been able to complete a total of three bays per 8-hour shift.

Observing that the crew was not getting the work done, Cook went up to the platform to talk to the men. Cook testified that Todd and Blake seemed to be leading the men from the day work started: The guys kind of followed them around. He asked Todd why production was proceeding so slowly, and Todd answered that:

[M]orale was low and the guys were pissed off and Brian Crowley was bird dogging his men and Jose [Robles] was yelling at his men rather than talking to them. He said that rules kept changing, that we tell them to constantly be tied off and wear their safety gear and they didn't like doing that, that they had trouble accessing the areas that they needed to paint wearing all their gear.

At about that time Blake walked up and Cook suggested that Todd and Blake have a talk with the men during an extended lunch, and discuss any problems and any solutions they could come up with to get the job completed on time; then they were to come and talk to the foremen, Cook, Robles, and Crowley, when they were finished. This happened, and after their crew meeting Todd, Blake, Bailey, and another painter met with the three foremen. The men, according to Cook, had two main concerns: they wanted to maintain discipline within the ranks for their own people; and they did not want to be "bird dogged" or checked on when they left and returned to their work areas. Cook, Robles, and Crowley met privately for a minute, and Cook decided to give it a try

<sup>12</sup> A division is an area approximately 100 feet by 350 feet, which is the same size as, and immediately above, the rolling work platform. A bay is a 25-by-25 foot cubicle within a division. There are 4 rows of 14 bays, or a total of 56 bays within a division.

“as things couldn’t get any worse.” Cook advised Todd, apparently as spokesman for the men, that the conditions were agreeable. After this the production was satisfactory for a time, and the first two divisions of the building in which they were then working were completed on schedule. However, the work in final division of the building was way behind schedule, and it appeared to Cook that the men were continuing the slowdown.

Cook had a brief meeting with Business Agent Kessinger sometime between July 6 and 15, during the period of the slowdown. Kessinger said that he had heard from some of the men that they were walking steel and using Genie lifts without outriggers. Cook said that this was the first time he had heard such complaints, and that if it was a problem he would take care of it. Cook suggested that Kessinger talk to the steward the next time and the steward could relay the message to Cook, as this would be a more expedient way to handle the problem. Kessinger agreed. Thereafter, Cook went to the safety department people, and then talked to Robles about this. Robles said that to his knowledge Kessinger’s information was incorrect. Cook told him to remind all the men to be tied off when they walked steel and to use the outriggers on the Genie lifts. The following day he met with the men, and also reminded them of the safety rules.

On August 10, the crew was scheduled to begin painting a new building, building 40/36. Apparently about a week or so prior to this date, while the crew was painting the final division of building 40/35, which work, as noted above, was not proceeding according to schedule, Cook told the crew during a lunchtime meeting that he had been advised that beginning August 10, the second shift would be strictly working 40 hours per week with no overtime, and that high bay painting work would be supplemented by painting crews on the first and third shifts.<sup>13</sup> Up to that point, the high bay painting had only been performed on the second shift. Cook told them that continuing to slow down the work was not the answer. He proposed that if they would pick up the pace and show that they could complete the divisions in the new building within the 60-hour per week time frame, he would ask Gary Elrod, Austin’s night-shift superintendent, to see if Boeing would agree to rescind the announced 40-hour maximum workweek, and permit the men to continue working a 60-hour week, thus apparently eliminating the need for the first- and third-shift painting work. Cook testified that the men got together and talked amongst themselves and decided to put forth their best effort to complete the divisions on time.

Cook did propose this to Elrod who thought that it was a reasonable request and said that he would talk to Boeing and try to get overtime extended if the divisions could be completed in a timely fashion by the second shift during the course of a 60-hour workweek. However, several days before the work in the new building was to begin, Elrod advised Cook that Boeing had decided not to extend overtime, and

that the second shift would be strictly working only a 40-hour week.

The preparation work in building 40/36 began on August 10. It consisted of erecting the containment curtain and masking off all the areas not to be painted. Cook observed that the 11 painters on the crew had not completed this preparation work within the 12 hours it should have taken them; rather, it took them 20 hours. Also, when the actual painting work began in the new building, the men were completing only one bay a day as opposed to the three to five bays per day they had been able to complete in the prior building. Cook learned from Robles that the men had a meeting during lunch, that they were trying to find a way to get their overtime reinstated, and that Blake and Todd were telling the men that they could accomplish this by slowing down their work, thereby forcing Austin to give them back their overtime. Robles told Cook that most of the crew had indicated that they agreed with this suggestion, and decided to slow down. In addition, he told Cook that some painters were complaining to him of being confronted by Blake and Todd and of being intimidated or threatened into joining their movement to try to replace Cook and his foremen.

Thereupon, Cook monitored the painting production and decided to have a talk with the men. He bluntly told them that the slowdown had to end and production had to pick up. According to Cook, the men did not deny that they were engaging in a slowdown. However, Cook’s warning was not effective, and production continued to decline. Paint usage went from 180 gallons a night to sometimes 25 gallons a night; the slowdown continued for about 10 days.

Cook was able to observe the crew’s work from the other side of the curtain where no one could see him. He saw that Todd, Blake, Steve Johnson, Sorter, and Smith seemed to stand out as the ones who were most conspicuously slowing down. Todd and Blake seemed to be doing all the talking, urging the other fliers not to get on their swing stages until Todd and Blake got their swing stages up in the air which, according to Cook’s observation, would cause a delay of 20 or 30 minutes. Once they did get up they would come down to go the restroom more times than it seemed humanly necessary, and would not return for 45 minutes. It seemed to Cook that the crew was working at about 25 percent of capacity.

Two or three days later he had another meeting with the crew, and said that production still had not picked up, in fact it had gone down since the last meeting, and that they would not be able to complete the division on schedule. He again told them that if the work did not pick up, Austin would be forced to replace either the entire crew or at least certain members of it, and that he would have to fire them and he really did not want to do that. Again, no one challenged his assertion that the men were engaged in a slowdown.

On August 19, Cook decided to have Robles assign Blake and Todd to the platform. That did not appear to be effective, as Robles said that they were still continuing to disrupt others, and refusing to do their job. Then, on August 20, Cook decided to remove them from the rolling platform, so they could not disrupt anybody. He reassigned them to work on Crowley’s crew. About an hour after the 4 p.m. shift started he received a call from Crowley who advised him that Blake did not have a putty knife or scraper to perform the assigned work. Painters are supposed to have the tools

<sup>13</sup> The five or six painters on the first shift would not actually paint, but would set up for the second-shift painters so they could begin painting immediately; this would increase the amount of painting that could be performed on the second shift. Further, the second-shift painters would not have to clean up; rather, the third-shift painters would just begin painting where the second-shift painters left off.

of the trade on their person. He told Crowley he could borrow one of Cook's scraping tools. About 5 or 10 minutes later he received another call from Crowley who said that Blake had refused to go to work. Superintendent Elrod was present and told Cook to tell Crowley that if Blake was refusing to go to work, he should be terminated.

About 5 minutes later, Crowley and Blake entered the trailer. Blake said that he was not refusing to go to work; rather, he had called his business agent, Bob Kesinger, and Kesinger told him to meet him at the gate. Cook said he would pick up Kesinger at the gate and bring him to Blake. Then Blake said that he was being harassed by having been taken off the swing stage and made to prep steel in the stairwells. Cook said that prepping steel was painters' work and that he and Todd were to do it just like all of Crowley's other men who were also prepping steel. At that point Todd entered the trailer and asked Elrod if he supported moving Blake and him out of the swing stages and replacing them with less experienced men. Elrod told them that they had been pulled off the stages and given jobs on the platform because they had been disrupting other people. Cook told Todd that he had continued to disrupt people on the platform, and therefore it was decided to remove him from the platform and assign him to an area away from the men on the platform. Todd then asked Elrod: "So, I'm being moved because of safety and production?" Elrod said that, "safety has never been an issue with us, you guys were working below your expected level of production, and that's the reason you were moved from the [stages]." Then the two left.

At 6:30 p.m., when Cook got to the gate to escort Kesinger onto the premises, Blake was standing there talking to him. At that point, Crowley called Cook on the radio and said that he had just fired Blake for refusing to go to work. Cook told Kesinger that he would escort him in. Kesinger asked why Blake was fired and why Blake and Todd had been removed from the swing stages. Cook told him that the men had been involved in a work slowdown, and were disrupting the other painters. Kesinger said that he thought the two had a good case for harassment and that they would probably win. Then Cook escorted Kesinger to where Todd was working. About 9:45 p.m., Cook received a call from Crowley who said that he had just terminated Todd for refusing to go to work. Thereupon, Cook told Kesinger this, and escorted him off the site.

Cook testified that thereafter the work still was not completed on schedule and the slowdown continued after the discharge of Todd and Blake. Cook continued to monitor the situation, observing the men from behind the containment curtain. Steve Johnson seemed to be the new leader of the group. Also, fliers Gary Sorter and Daryl Smith were urging the men to slow down and not go up in their swing stages until Sorter and Smith did; they were taking extended bathroom breaks and too much time getting up in their swing stages. Robles and Crowley reported the same types of things to Cook: Crowley reported that he had seen Chuck Shelton and John Ford disrupting the other men and working well below their normal production capabilities, and also doing "real sloppy work." Crowley told Cook that he had reprimanded them and had told them that they would be fired if they did not pick up the pace and end the slowdown. Robles also told his men the same thing. The slowdown caused significant problems, because the work that had not

been completed prior to the relocation of the platform had to be done from the ground with manlifts and single spider baskets, and this was very costly and time consuming.

On Monday, September 14, at the regular toolbox meeting, Cook gave the painters a refresher course on the meaning and purpose of yellow caution tape, as Shelton and Ford had been told to cross the tape by Crowley and they had refused. Apparently they were worried that they could be fired for crossing the tape. Cook told the men to use their common sense.

About 7 p.m., 3 hours after the shift began, Bailey told Cook that Crowley had pulled a knife on Shelton. Cook told him to get Shelton and meet Cook in the trailer. Then Cook summoned Robles and Crowley. He told Crowley what Bailey had accused him of. Crowley denied it and said that he had never pulled a knife on anybody in his life. Bailey kept repeating that Crowley had done this, and the situation was getting "very confrontational." Crowley became upset and, according to Cook, said that if Bailey did not shut his mouth he was "going to take him out in the parking lot and kick his ass." Cook told everyone to calm down, and told Bailey to go find Shelton. A few minutes later Shelton came in with Myron Peterson, another steward. Cook asked Shelton what had happened, and Shelton said that Crowley had asked him if he was going to file a grievance for crossing a yellow tape, and then asked him again, and then held his arm up with a knife. Crowley said that he never pulled a knife on anybody, and Bailey said that he knew Crowley did it because Shelton did not lie. It turned into a heated argument. Crowley said that he knew why this accusation was made: it was because Shelton had been involved in the slowdown and Crowley had admonished him for it, and now Shelton was making this ridiculous claim.

About 10 o'clock that night Cook received a call that Boeing security was in the building, and that they were looking for Steve Johnson, Shelton, and Crowley. Boeing security officers said they had received a call from a Boeing facility supervisor, and that Steve Johnson had reported that Brian Crowley had pulled a knife on Chuck Shelton. They said that pending the investigation, Crowley would be required to leave the job immediately.

Cook had a discussion with Jim Alger, the new second-shift painting superintendent who had taken Gary Elrod's place. Cook told Alger that Johnson had not witnessed the alleged knife incident, and that, according to Robles, Johnson had vowed to get back at Crowley for firing Blake, his former swing stage partner; further, Johnson was involved in the slowdown which had continued after the discharge of Blake and Todd. Alger decided that what Johnson had done was a "malicious lie" to get back at Crowley. Jose Robles believed that this was the case also.

The next day, September 15, Alger instructed Cook to discharge Johnson. Alger told Cook not to give Johnson a reason for firing him, as Johnson would be filling a grievance over the matter and he would find out then. Crowley, who had been removed from the site pursuant to the instructions of Boeing security personnel, was off for 1 day and then returned to work. Shelton was reassigned to the day shift so that he and Crowley would be separated.

On September 17, Cook was in his office talking to Alger. Previously, another painter, Ty Miles, had come in and complained about being confronted by Bailey. He said that Bai-

ley had wanted him to make a list of safety problems on the job and join their movement. Alger asked if Miles would mind making a statement about this, and Miles began writing out his statement. Cook and Alger went into an adjoining room. Cook testified that he observed Shelton opening the door to the office. Alger went to see what Shelton wanted and, upon returning, said that Shelton had entered the office and was asking Miles what he was doing there and what he was writing; when Alger asked what business Shelton had in the office, Shelton said he was looking for his paycheck. It is company policy that the foreman brings the paychecks to the men every Thursday; Alger told Shelton to go back to his work area.

Later that day, after discussing the situation, Alger said that he had decided to get rid of all the rest of the painters who were involved in the slowdown. He told Cook to make a list of the men who were involved, and to discharge them the next day. Cook talked with Robles and Crowley and made up a list of employees whom they believed were continuing the slowdown, namely, Chuck Shelton, John Ford, Gary Sorter, and Daryl Smith. They were fired by Cook at the close of their respective shifts on the following day, February 18. This was on the last day of the scheduled work in division 1 of building 40/26. This division was not completed on schedule, that is, prior to the relocation of the rolling work platform.

Following September 18, according to Cook, some new men were hired but most of the men who replaced the discharged fliers had been on one of the various crews and merely had to be reassigned. Production exceeded anything that had been done in the past. All the divisions were completed on schedule. On several nights the painters used more than 200 gallons of paint, and on one night they used over 240 gallons.<sup>14</sup> The work of the new crew during the 40-hour workweek exceeded any work ever done during the period of the 60-hour workweek.

Cook has remained as second-shift general painting foreman to date. The high bay work was completed in about October 1993.

Cook testified that he never asked Controls Manager Toole or any engineers from the safety department the identity of anyone who might have been presenting safety complaints, and that he never did find out who was making the complaints. He was not given advance notice of the observation of the second-shift painting work by safety engineers. He never asked the men to use Genie lifts without outriggers; rather, he constantly told the men to put use the outriggers. He never asked any of the men to walk steel without being tied off, or to erect the containment curtain without being tied off; rather he warned them not to do these things when he observed them committing such or similar safety violations. And he never instructed Robles or Crowley to cut safety corners so that the work would go faster.

Cook testified that he was reluctant to fire the men because initially most of them had demonstrated that they were really good workers; he felt that they were a good crew before the slowdown, and believed that he could turn them around.

#### *f. Testimony of Superintendent Jim Alger*

Jim Alger was appointed to the job of second-shift superintendent on August 31. Alger testified that he was advised upon assuming the position that there were some problems with a slowdown and that two people had been terminated. He observed that painters would seem to be wandering around away from their work areas, spending time on the telephone, and going to or coming from the bathroom.

On September 14, Cook reported the knife incident to Alger and advised him that he had a meeting regarding the incident with Bailey, Shelton, and Crowley during which there was some name calling and threats. Alger told Cook to contact Kesinger about the matter. Then, later that night, Alger was advised that Boeing security, with flashing lights and uniformed officers, was in the building. The lieutenant in charge told Alger that they had received a report from Steve Johnson that Crowley was threatening Shelton with a knife. She wanted to talk to these people.

Later, Cook advised Alger that he believed the knife incident never happened, and that he felt this was a deliberate act on Johnson's part to get Crowley fired in retaliation for Crowley's firing of Blake and Todd, which events occurred prior to Alger's appointment as second-shift painting superintendent. Alger concluded from all he learned about the situation that this was a malicious act by Johnson, and instructed Cook to discharge him the next day. According to Alger, he did not talk to Johnson about the matter, as Johnson had not been involved in the alleged knife incident, and therefore anything that Johnson might have had to say could have made no difference. He told Cook not to fill in the reason for Johnson's termination on the separation notice, as this would be related during the union grievance procedure which Alger anticipated.<sup>15</sup> After Johnson was fired, he and Bailey and another steward, Myron Peterson, came into Alger's office and asked why Johnson had been fired; Alger said it would be taken up in step one of the grievance procedure.

At a subsequent meeting with Cook and Bailey, Alger told them that things seemed to be getting out of hand and that if these matters could not be settled "in-house" it would probably lead to getting rid of all the painters and Austin was thinking about contracting the work out. He never told Bailey not to go to his business representative. Things did not improve, and Alger learned of several threats that were made to the painters by their own membership with regard to the payment of dues and the making of statements against the Company. On Thursday, September 17, one of the painters, Ty Miles, approached him and said that some of the union members were really bothering him about not joining the work slowdown. Alger invited him to the office and gave him a legal pad to write out a statement about this. Alger and Cook were in an adjoining room while Miles was in the process of preparing the statement when Shelton entered the office. Shelton was looking over Miles' shoulder and it appeared that he was trying to intimidate him, as Miles seemed to be trying to cover up the paper. Shelton did not know that anyone else was in the office and, according to Alger, appeared startled when Alger entered the room and asked him

<sup>14</sup> Records noting the number of gallons of paint used per shift are not kept, and Cook's testimony in this regard is from his recollection of the gallons of paint used.

<sup>15</sup> In fact, it appears that no grievance was filed. There is no contention by the parties that this matter or any other matters involved herein should be deferred to the contractual grievance procedure.



what he was doing there. Shelton replied that he was looking for his paycheck. Alger told him to go back to work and that he would receive his paycheck from his foreman who would bring it to him as he always did.

When Shelton left, Miles appeared frustrated and told Alger that he felt that management was obligated to protect him. Alger discussed all the problems with Cook and it was decided that the slowdowns, the “sabotage,”<sup>16</sup> all the things that were happening on the work platform, were enough, and that Alger was going to fire all of those involved. Alger, who was new to the shift and was the responsible onsite representative of the Respondent, evaluated the situation and believed that the problems seemed to be escalating; he felt that if he did not take an immediate and firm stand, somebody was going to get hurt out there.

The Respondent introduced into evidence labor cost reports showing the number of hours spent by the painters to complete the high bay painting in various buildings. The reports, detailing the number of man-hours it took to paint various buildings, coupled with the testimony of various witnesses who testified that the painting of the buildings to be compared was of equal difficulty, show that it took the crew considerably fewer man-hours to paint comparable buildings after the date of September 19.

*g. Testimony of employee Becker*

Stan Becker was hired in March as a painter on the second shift. He was a flier on a swing stage. He is a member of the Union. On August 4, he was made a foreman in another area of the building not involved herein. At the time of the hearing he was no longer a foreman, but was a rank-and-file painter. Becker testified that when the amount of overtime was reduced the men decided to engage in a slowdown, and that the slowdown was also for the purpose of attempting to get Cook to hire more men for the painting of the lower truss work, as this was work the fliers did not like to do.

Becker testified that at a meeting of the crew, Todd said that the men “were going to ‘group fuck’ them, we’d done it before and we’ll do it again.” After that, the painters engaged in a slowdown by taking long breaks and lunches, by taking 45-minute bathroom breaks, and by failing to take the stages up before the first break (2 hours after the beginning of the shift). Becker testified that if one man on the swing stage took a long bathroom break, this shut down the entire operation of the stage for that period of time. In addition to Todd, Steve Johnson and Jim Blake were also the ones who were attempting to set the pattern for the slowdown by trying to keep all the stages from completing more than three bays a night, although some bays were much easier to paint than others. According to Becker, the fliers were capable of painting four or five bays a night if they tried hard. The men blamed Cook for the loss of their overtime, and also did not like the fact that Cook had appointed his father, Lonnie Cook, to the position of foreman. Blake and Todd applied the peer pressure when Becker began working on the platform: They would tell him not to go up on the stage before first break, and if Becker was prepared to go up, they would stand there and shake their head, indicating “no . . . don’t do that.”

<sup>16</sup> Alger did not specifically explain what he meant by the term “sabotage.”

Becker admitted that he, too, participated in the slowdown which started about the beginning of July. He said that he “would clean my mask, stand around, play mumbledy-peg—that’s throw our knives into the deck. Just more or less stay out of sight, out of mind, you know.” Also, the men would stay away from Robles who was working on the other side of the platform, but when Robles saw them he would tell them to get to work.<sup>17</sup>

Becker testified that the lower truss work would have to be done off a ladder from the platform, because the foremen would not let the men walk the steel; the ladder would have to be moved about every 6 feet. This was a lot of work. The men did not want to do it; they thought they were better than that. Therefore, they wanted to force Cook into hiring more painters to do the lower truss work so they would not have to get out of their stages. Most of the lower truss work was done by Becker, Daryl Smith, Don Curtis, and Gary Johnson.

At one of the meetings of the fliers, which was held pursuant to management’s direction in order to discuss some of the problems the men were having, Todd said that the fliers were irreplaceable, that they were in short supply and great demand, and that management could not find anybody else to do the job.

Becker testified that he was never asked to walk steel, and that the foremen told the men to stay tied off at all times. However, according to Becker, the men did not follow the safety rules because “steel painters got this macho image that they could do anything. Walking steel is just part of the trade.” When foremen saw this, the men would get in trouble for it and would be made to get down and get tied off. If somebody important was coming, they would just tie off. Todd and Blake were the biggest offenders; they never had their safety lines hooked up; and they would smoke in their stages, which was against the rules. Todd would have fog wars with his paint thinner, which is highly volatile. He sprayed it in the air and on the plastic, and tried to squirt his partner with it. Also, the fliers would shake their rigging loose from the ceiling beams instead of using the Genie lifts to get it down, as this was the fastest and easiest way to do it. The foremen never told them to do it this way.

Becker testified that when overtime was eliminated, Cook told the men that he would try to get Boeing to retain the 60-hour workweek if they quit laying down on the job. The fliers had a meeting and agreed to quit the slowdown and to get the work done. According to Becker, they did do this.

After August 4, when Becker became a foreman, he worked on the graveyard shift from 11:30 p.m. to 7 a.m. The second-shift painters had been instructed to drop their spray guns out of their stages to make it easier for the next shift. However, they did not do this; rather, they would take their hoses and wrap them around everything to interrupt the ability of the next shift to do the job. According to Becker, “You’d have to be doing a square dance up there with them stages to do some of the things they were doing with them hoses. That showed me they were just trying to disrupt my job.” However, Becker did not report this to higher supervision. He testified that:

<sup>17</sup> Robles, according to Becker, was a hard working foreman and was “a little high strung,” but did not yell at the men.

I'm a union man, these are my brothers, we're both painters. . . . I had a job to do, and my job was to get these things done. If I went to my supervisor and whined to him that these guys are doing these things and I'm not being able to foreman my job, that makes it look like that I'm not capable of handling a supervisor's job.

However, he did make a number of attempts to talk to his friends on the second shift out in the parking lot. He told them that the slowdown was not going to do any good, and that they were going to lose their jobs.

#### *h. Testimony of General Superintendent Richard White*

Richard White, general superintendent on the high bay project, testified that in early July he did not tell an employee that the Company would separate three troublemakers by forcing them to quit or walk off the job. He also denied telling Business Agent Kesinger and Shop Steward Bailey that Crowley did not fire Blake and Todd, but rather that Peterson did, and that there was nothing White could do about the matter.

Further, White testified that he never told Kesinger or Bailey that if anyone crossed a caution tape the individual would be fired. The one person who had been discharged after crossing a caution tape was discharged not for crossing the tape, but for walking across fresh concrete, which had to be refinished.

#### *i. Testimony of Foreman Brian Crowley*

Brian Crowley testified that he began working for Austin in April 1992, and voluntarily left in February 1993. He was first working on Lonnie Cook's crew, and was assigned to Robles' crew as a pot tender. At this time the painters were working from 60 to 74 hours a week in order to keep up with the schedule of the rolling work platform. Later, in about the latter part of June, Crowley became foreman of the tower crew. After the announcement in July by Cook that work on the next building would be limited to 60 hours per week, he observed that the work of the high bay crew and the tower crew was not going well: It was not on schedule, and the men would come nowhere near to getting the work done. Cook had a meeting with the men, and an agreement was reached to end the slowdown. It was agreed that the men could be responsible for discipline within their own ranks, and that Robles and Crowley would stop "bird-dogging" them.

Within the next day or so Cook announced that he had been notified that Boeing was going to terminate all overtime as soon as building 40/35 had been completed. Cook told the men at a meeting that continuing the slowdown would not get their overtime back and would not accomplish anything, and said that if the men completed the next two divisions on schedule he would do his "damndest" to try to get Boeing to permit Austin to continue with the 60-hour workweek. The men discussed it and agreed to pick up production and finish those next two divisions on schedule, which, according to Crowley, they did do. The final division of building 40/35 was completed on August 5. Later that week Cook told the crew that Boeing had decided not to extend the overtime work, and from then on they would be working only 40 hours per week.

On August 20, Cook assigned Todd and Blake to Crowley's crew. Crowley had them prep steel in the stairwells. What is needed for this work is a putty knife or a scraper, and a duster, such as a small broom. Crowley assigned the men to different work stations. Todd said that he did not have a duster, and Cook said he would bring him one. He took Blake to another location and Blake said he did not have any tools. Crowley told Blake he was required to have tools and found a piece of angle iron on the ground and gave it to him as a temporary scraping tool. Blake refused to accept it and said, "You've got to be kidding." Crowley said it was fine, and Blake said he was not going to accept it. Crowley told him to remain there in the stairwell and he would get him what he needed. He called in on the radio and told Cook that Blake had no tools, and Cook replied that he had a couple of scrapers in his desk drawer. Thereupon, Crowley brought Todd the items he needed, and went to the area where Blake was supposed to be working in order to give him the scraper. Blake was not there. After spending about 15 minutes looking for him, Blake finally appeared and said he had gone to the bathroom. Crowley gave Blake the tools that he brought for him, and Blake refused to accept them. Crowley reported this to Cook on the radio. Elrod overheard the communication and said that if Blake refused to do his assigned job he should be terminated. Blake overheard this and said that he wanted to talk to his business agent. Crowley said he could call the business agent from the trailer.

Elrod and Cook were in the trailer when Crowley and Blake arrived. Blake said that he had not refused to work. He said that he considered his assignment to constitute harassment. Cook said that he was not being harassed; rather, he was taken off the swing stage because he was slowing down work and disrupting others who wanted to work; then he was placed on the rolling work platform where he continued to disrupt the work; and finally he had been moved to Crowley's crew in the hope that he would "shape up." About this time Todd walked in and said that he considered his job to be punishment. He asked Elrod whether he agreed with what Cook had done: taken experienced fliers and replaced them with inexperienced painters. Elrod said that Robles had informed him that Todd was slowing down his work and disrupting the work of others. Elrod said that he could just not allow that to happen, and he could not allow Todd's disruptive activities to affect his partners. Todd then said: "What you're saying then is we were moved from the platform because of production and safety." Elrod said that "[s]afety has nothing to do with it, it's not an issue here, what is an issue is your productivity." The meeting ended and Todd and Blake went back to work.

A short time later Crowley went over to where Blake was supposed to be working, and, again, could not find him. Later, Crowley found him talking to Safety Engineer Steve Lotz. Crowley told him to go back to work, and Blake said he was waiting for his business agent. Crowley said that Cook was going to bring the business agent to him, and to go back to work. Blake refused. At that point Crowley called Elrod who instructed him to get Blake's badge and hard hat and send him home. At that point Crowley terminated Blake.

After that Crowley was making his rounds and observed Todd talking with an apprentice. He asked Todd what he was doing, and Todd said he was talking. Crowley told him that

he should be working, and Todd turned and headed back to the stairwell. Later he saw Todd talking with another person, and again instructed him to go back to work. Todd refused, saying that he refused to do punishment work. Crowley said it was not punishment work, and gave him the option of returning to work or being terminated. Todd elected not to go back to work, and Crowley discharged him.

Crowley testified that after August 20, the quality of the work did not improve; in fact, according to Crowley, it got worse. Crowley had eight men on his crew. He had given Shelton and Ford a "free hand" to work on the tower section; they were essentially to act as his lead men up there, and were to advise him of any particular problems. After about a week, Crowley saw that the work was not being finished; they were way behind, and the quality was poor. He told them that "it was the most pathetic example of journeyman-level painting he had ever seen."

He again met with his crew on about September 8, and told them that things had to improve. He told Shelton that no work was being done in the section that he and Ford were responsible for, that Shelton had "better fix it," and that "[i]f I have to spend the whole night up here baby sitting people, I'm prepared to do that, but I'd rather not do that because you're men, I know you're capable of getting this job done, if you want to." Shelton did not respond. The next day, September 9, he invited Bailey to walk through the area, and pointed out the sloppy workmanship. Bailey agreed that it looked pretty bad. Crowley told the crew that he knew what was going on, and that if it did not stop he was going to make some adjustments. He said that he wanted to find out who was responsible, and that when he did he would fire them.

On Friday, September 11, Crowley told Ford and Shelton that there was some painting work to finish up; he told them that he had talked with the carpenter foreman on the job who said that he had left some decking beneath an area that the tower crew had not painted, and had placed caution tape around the decking because there was no railing around it. He assured Crowley that the deck was safe for the men to use as a platform. Crowley told Ford and Shelton that it was particularly important that they paint the conduit in this area immediately, as the carpenter foreman had advised him that he was going to be taking down that decking, and the conduit was in a location that it would be very difficult to paint without the decking being in place. He told them that the decking was safe and sound. This was about 4:30 p.m.

Crowley did not return to the area until about 10:30 p.m., some 6 hours later. The conduit area had not been painted. He asked Shelton why this had not been done, and Shelton said that Shop Steward Bailey had told him not to do it. Crowley located Bailey and asked him why he told the men not to do the painting, and Bailey said he told them not to cross the yellow caution tape. Crowley explained his earlier conversation with the carpenter foreman, and told Bailey that the decking was safe. Then he went back to Ford and Shelton and began instructing them on the procedures he wanted them to follow to do the work. They had to be tied off because there was some ladder work to be done close to the edge of the decking. He told them that he was their boss and they were going to follow his instructions, not the instructions of Bailey. He also told them that if they were concerned about safety matters they should come to him or to

the safety department rather than Bailey. Shelton told Crowley that he was concerned about crossing the yellow tape because he thought he could be fired for doing that. Crowley told Shelton that he would never ask him to do anything he considered unsafe, and that the carpenter foreman had assured him it was okay to work behind the caution tape. He explained that it was permissible to cross the yellow caution tape and that it was not typical that men would be fired for crossing it; rather, it was the red "danger" tape that they should never cross. After that, Shelton and Ford apparently did the work, as assigned.

The following Monday, September 14, at the beginning of the shift, Bailey approached Crowley and said that he did not appreciate Crowley telling the men not to talk to him. Thereupon, Crowley admonished Bailey, and said that he did not tell the men not to talk to him; rather, he told them that he was their boss and they would do what he told them to do, not what Bailey told them to do. He said he did not mind Bailey's safety concerns, but he objected to the fact that Bailey, by telling them not to cross the caution tape, was interfering with work. Bailey denied that he told them this, and "left in a huff."

The regular Monday toolbox meeting was held shortly thereafter. Cook mentioned that a couple of painters were concerned about being fired for crossing a yellow tape, and reiterated what employees were told when they went through safety orientation, namely that yellow caution tape means you can work behind it but you have to be cautious and careful; further, Cook reminded the men that they should never cross a red tape under any circumstances, and that they could be fired for doing so.

Immediately after the toolbox meeting Crowley happened to see Shelton. He asked how he was doing, and said, "Hey, Chuck, are you going to file a grievance against me for asking you to cross that yellow tape?" Shelton said no, and added that it was Ford, not Shelton, who did not want to cross the tape. Crowley testified that he had nothing in his hand and did not threaten Shelton with a knife. He saw Ford and Steve Johnson pushing a swing stage on a dolly, and he yelled to Ford, asking him the same question. Johnson and Ford glared at him but did not say anything.

Crowley testified that he asked the question to the men because it seemed ridiculous to him that they did not do exactly what he told them to do, that their failure to do the work was not for a legitimate reason and was part of the slowdown, and that there was something going on because, earlier, Bailey had claimed that Crowley told the men not to talk to him. Crowley testified that "[i]t seemed that there was a big deal being made out of the tape incident, and that's essentially what prompted me to ask the question."

Later that evening he was called into Cook's office. Bailey and Robles were present. Cook said that Bailey was accusing him of pulling a knife on Shelton. A yelling match ensued, and Crowley told Bailey that if he did not "shut the fuck up I'm going to take you out in the parking lot and I'm going to kick your ass." Bailey began daring him to hit him. Then Shelton was brought into the room, and said that Crowley had threatened him with a knife. Crowley said that this was "bull shit and a lie," and that the reason that this false accusation was being made was because (several days earlier) Crowley had reprimanded Shelton and had told him that

he was lying down on the job and doing shoddy work. Shelton denied this. Cook put an end to the meeting.

Crowley explained that he and all painters carried knives, that a knife was an essential tool of the trade. Indeed, a few days earlier, he and Shelton had cut plastic with Crowley's knife. Boeing security sent Crowley home on the night of September 14, and the Respondent brought him back to work on September 16. Paint production did not improve. On the next day, Cook asked Crowley to prepare a list of the painters on his crew he believed to be involved in the slowdown.

#### 4. Other evidence

##### a. Grievances

Four grievances, prepared by Kesinger,<sup>18</sup> were handed to Cook by Kesinger on the night of September 17, two by Shelton and one each by Ford and Bailey. Ford's grievance is identical to one of the grievances filed by Shelton, namely:

*Nature of Grievance:* Brian Crowley, Foreman for Austin Company, instructed Chuck Shelton to cross into a "caution taped or concealed area" at that point Chuck sought out Joe Bailey, Job Steward, to advise on procedure of entrance into the said area. Joe Bailey, Job Steward, advised him to follow the direct order of Brian Crowley, Foreman for Austin Company, which resulted in reprimand of Chuck Shelton for consulting the Job Steward.

*Adjustment Requested:* That foreman and Company personnel of Austin Company stay consistent with Company policy and procedure. And the crew has the right to seek consultation from the Job Steward when deemed necessary without reprisal.

The second grievance filed by Shelton is as follows:

*Nature of Grievance:* On September 14, 1992, Brian Crowley, Foreman for Austin Company, asked numerous times during the day if I had intended to file a grievance over Friday, September 11, 1992, incident with Crowley. I, Chuck Shelton, commented that I hadn't made any decision yet. Brian Crowley became violent at one point and pulled a knife on myself.

*Adjustment Requested:* Austin Company Personnel stay consistent with Company policy and procedure. That Brian Crowley be removed from Foreman status.

The grievance filed by Bailey is as follows:

*Nature of Grievance:* Brian Crowley, Foreman for Austin Company threatened the Steward (Joe Bailey) with bodily harm after several situations of verbally accosting the Steward.

*Adjustment Requested:* Steward to be allowed to do his duties without any more interference from the foremen [sic]. Also, the foremen to cease quizzing the crew to the context of discussions between the crew and the Job Steward.

<sup>18</sup>In addition, Kesinger handed Cook separate letters, dated September 17, appointing Shelton and Ford as job stewards as of that date.

##### b. The WSHA investigation

Mathew Stroud is a safety and health specialist for the Washington State Department of Labor and Industries (WSHA). Upon receiving a written complaint from Todd in August, Stroud was assigned to investigate it. The complaint lists nine "hazards" which are alleged to exist in the workplace. Essentially, they encompass all of the safety concerns raised by Todd as set forth above. Stroud contacted the Respondent and asked for a response to the complaint. He received lengthy written responses from various individuals. Then, on September 2, Stroud proceeded to make an onsite inspection during the first shift, because the complainant said that the foremen never do anything wrong if there is a safety person on the site watching them. Apparently he checked out the equipment alleged to be defective. During this visit he talked with Shop Steward Bailey and other employees. Then he obtained a list of second-shift employees from Controls Manager Toole, and made phone calls to several of those individuals. He spoke with employees Todd, Bailey, Donald Curtis, Gary Johnson, Ronald Ruther, and Robert Seagle. Only Todd and Bailey were willing to put anything in writing and, according to Stroud, most of Bailey's information was simply hearsay.

Stroud testified that of the employees he spoke with, both onsite and by phone, some agreed with some of the alleged violations, some disagreed, and some had no knowledge, but most of what they had to say was hearsay. Stroud concluded his investigation and, as he did not observe any violations and none of the employees with the apparent exception of Todd was willing to put anything substantive in writing, the complaint was dismissed.

#### 5. Analysis and conclusions

I conclude from abundant record evidence that the painters, rather than their foremen, ignored the various safety requirements they were continually requested to follow. The work was difficult, the safety equipment was cumbersome and often a nuisance, and many of the men felt that they did not need to be constrained, either physically or otherwise, by such equipment or rules. They were continually reminded of the Respondent's considerable concern for on-the-job safety, they worked under a collective-bargaining agreement which specifically required the Respondent to assure safe working conditions for its employees, and they had a second-shift union steward and a grievance procedure to protect them from foremen who may have requested that they perform work in an unsafe manner. Further, if any legitimate safety matters were brought to the attention of the foremen or the safety department, such matters were immediately investigated and resolved. Indeed, on one occasion employee Daryl Smith believed that a work assignment given to him by Robles was dangerous, and contacted his union steward about the matter. An accommodation was reached, and there is no evidence of any resulting harassment. I find that no safety grievances were filed because the foremen did not request or demand that such rules be ignored; rather, the employees elected to ignore the stringent safety regulations required of them for a variety of reasons which had nothing to do with fearing retaliation by their foremen.

I find that the painters, at first led by Todd and Blake, and then, after their discharge on August 20, by Steve Johnson,

had made a determined effort and, in effect, entered into a conspiracy to retaliate against management. This took many forms and it was motivated by a variety of biases against the foremen. Although different employees may have had differing reasons for so participating, including, as Becker testified, peer pressure from their leaders, nevertheless they jointly engaged in a slowdown and caused the Respondent added expense as a result of their failing to complete the divisions on schedule. It is clear, and I find, that subsequent to September 18, when the remainder of the employees involved in the slowdown were discharged, the work was completed in a timely fashion. Moreover, it appears that in performing such work the members of the new crews were not being caused by Cook, Robles or Crowley to ignore the safety rules, as there is no record evidence of such conduct, nor were any safety related grievances filed thereafter.

I find that the discharges of Todd and Blake on August 20, were for the reasons given by the Respondent; namely, they had been the leaders of the slowdown to that date, and refused to perform the work in the stairwells as assigned. Contrary to the complaint allegations, I do not find that they were removed from the swing stages or, thereafter, from the platform for reasons relating to their safety complaints. In this regard, I credit the testimony of those witnesses for the Respondent, namely, Toole, Lotz, Robles,<sup>19</sup> Cook, Crowley, and Becker, who testified either that they observed Todd and Blake slowing the job down, or that Todd directly told them that he was slowing down the job.<sup>20</sup> In this regard, it appears that Todd had his own agenda and, in addition to other motives for his catalogue of complaints to Toole, he sought to be appointed to the position of foreman; apparently, he believed that advising Toole of his ability to affect the progress of the work would benefit him in this effort.

I have carefully considered the testimony of Foreman Brian Crowley and Charles Shelton, together with the other record evidence bearing on the alleged knife incident on September 14. Thus, several days previously, Crowley admonished Shelton, telling him that he was slowing down the job, that his work was poor, and that he would be discharged if such deliberate conduct did not stop. Further, on September 11, he had warned Shelton about refusing to cross the caution tape to paint the conduit. Thus, Shelton had a motive to falsely accuse Crowley of threatening him, namely, to protect himself from what had befallen Todd and Blake a month earlier. In addition, Shelton, according to his own testimony, related the alleged knife incident only to Ford, and apparently did not believe the matter was of sufficient significance to report it to higher management or even to Bailey. Shelton's immediate reaction to allegedly being threatened with a knife by his foreman would appear to be inconsistent

with the expected reaction of a reasonable person under similar circumstances.

In contrast, Crowley appeared to be a highly credible witness. And, in handling the "caution tape" incident, he dealt with Shelton, Ford, and Bailey, I find, in an entirely reasonable and appropriate manner. Under these circumstances, it is highly unlikely that, absent any history of clearly erratic behavior, Crowley would have blatantly threatened an employee with a knife, thus jeopardizing his job and perhaps even being subjected to criminal sanctions, in order to intimidate him from filing some clearly nonmeritorious and even bogus grievance. This is particularly true given the fact that, according to Shelton, he did not even imply to Crowley that he intended to file a grievance; rather he nonchalantly answered Crowley's question about the possibility of a grievance by stating, "Brian, let's just forget about it." That this rather amicable response prompted Crowley to pull a knife on him seems highly unlikely. Under all the related circumstances, I credit Crowley's testimony in its entirety and, in particular, find that he did not in any manner threaten Shelton with a knife on September 14 or at any other time.

Having determined that Crowley did not so threaten Shelton, the subsequent scenario as to the possible involvement of Shelton, Ford, and Johnson in a contrived conspiracy becomes a matter of speculation; however, this matter need not be resolved herein. Whatever may have transpired among these men, it is clear that Johnson, who had no involvement with the knife incident or with Crowley's admitted challenge to Bailey to fight him in the parking lot, in effect elected to take matters into his own hands because, as he so stated, he had no confidence in Shelton, Bailey, or the Union, and believed that whatever action they decided to take would not be satisfactory to him. Thereupon, according to Johnson, on his own volition, some 6 hours after the alleged knife incident and, apparently, a considerable amount of time after the meeting between Crowley and Bailey in Cook's office, he believed the matter to be of such immediate volatility that he called Boeing security.

Johnson's avowed reasons for summoning Boeing security that night are not persuasive. I conclude, from all the surrounding circumstances, that he was simply attempting to find a way to remove Crowley as a foreman and/or to embarrass him or cause him mental anguish in order to get even with him for discharging Todd and Blake, Johnson's friends and former partners in the slowdown. In this regard, I credit the testimony of Robles, who stated that as he was bringing Johnson down to speak with Boeing security, Johnson said, "I'll get even with Brian Crowley; and I called security on him; and he's just as guilty as . . . pulling a knife"; further, during this conversation, Johnson specifically told Robles that by calling Boeing security he was getting even with Crowley for "railroading" Blake and Todd. Accordingly, I conclude that the conduct in which Johnson engaged was for no legitimate purpose. Rather, it was undertaken for vindictive reasons which do not come within the purview of union or protected concerted activity; indeed, it appears that neither Bailey nor Shelton were even contemplating such action, and they did not testify that they so authorized Johnson to act in their behalf. I find that Johnson, who admittedly had no confidence in either Bailey or Shelton to handle the matter as

<sup>19</sup>The record evidence shows that while Robles was a foreman, he was also considered to be a "union man," even to the extent that Union Steward Bailey enlisted him to collect union dues from the men. Thus Bailey testified about Robles: "He's in the Union; he's supposed to be a brother—I asked him if he would go see these individuals so I could keep working. And he said that yes, he would." Thus, it appears that to a considerable extent, the men were not reluctant to take Robles into their confidence.

<sup>20</sup>The fact that Safety Engineer Evans, who attended the August 14 meeting, did not so testify does not cause me to doubt the credibility of the named individuals. Evans admitted that his recollection of the meeting was "somewhat minimal."

Johnson deemed best, was acting entirely on his own.<sup>21</sup> I therefore find that the discharge of Steve Johnson on September 15, was not violative of the Act, as alleged.<sup>22</sup>

I conclude that Shelton, Ford, Sorter, and Smith, who were discharged on September 18, had been continuing the slowdown. In this regard, I credit the testimony of Crowley, Robles, and Cook who stated that after repeated admonitions, warnings, and even threats of discharge, the painters' workmanship and production showed no improvement. Finally, with the attempt of Shelton to intimidate another painter, Miles, who was in the process of writing out a statement in the office regarding the slowdown,<sup>23</sup> Superintendent Alger, whom I credit, evaluated the situation and decided that some action, other than further entreaties to the men to mend their ways, had to be taken. Thereupon, he directed that the forenamed individuals be terminated. I conclude that these individuals were discharged because they were participating in a slowdown, rather than because of any union or protected concerted activity in which they may have been engaged. Accordingly, I shall dismiss the allegations of the complaint pertaining to the discharge of these employees.

In determining whether the various discharges of the seven individuals involved herein were violative of the Act, I have applied the *Wright Line* test.<sup>24</sup> Assuming arguendo that the General Counsel has presented a prima facie case showing that the named employees were discharged following their participation in union or protected concerted activities, in all instances the Respondent has sustained its burden of demonstrating, by credible evidence, that the discharges were not motivated by unlawful considerations, as alleged, but rather were motivated by legitimate business considerations.

I credit the testimony of Richard White and find that he did not tell an employee in early July that he intended to get rid of three troublemakers by forcing them to quit or walk off their jobs. I shall dismiss this allegation of the complaint.

I credit the testimony of Jose Robles, and find that in early September he did not threaten Daryl Smith or any other employee by telling them that if grievances and safety concerns were not dropped the Respondent would lay off the whole crew. I shall dismiss this allegation of the complaint.

I find that on September 14, Brian Crowley did not unlawfully interrogate employees about whether they were going to file grievances over safety concerns, or threaten Shelton with a knife because he was considering filing a grievance over safety concerns. Such questions by Crowley to Shelton and Ford were not made in an atmosphere of intimidation, but were merely innocuous questions unaccompanied by any coercive conduct; and, as found above, Crowley did not threat-

en Shelton with a knife. I shall dismiss these allegations of the complaint.

It was made abundantly clear both by Johnson's admission to Robles, and by the Boeing security personnel, that Johnson had summoned them to the premises. This was widely known; and the fact that one or more supervisors may have asked about this, possibly to verify what Boeing security had already divulged, does not constitute coercive interrogation. I shall dismiss this allegation of the complaint.

I find that Crowley's threat to fight Union Steward Bailey out in the parking lot is not violative of Section 8(a)(1) of the Act, as alleged. While Crowley admittedly made such a statement during what may be characterized as a grievance meeting, this was the spontaneous utterance of someone who had just been falsely accused of a criminal offense, and the argument between Crowley and Bailey was short lived, with no further threats being made. Under the circumstances, Crowley's loss of composure is certainly understandable. I shall dismiss this allegation of the complaint.

The complaint alleges that in early September, Bailey was assigned the job of scraping stairs and painting bathrooms, and was isolated from other employees, in order to discourage him from engaging in union and concerted activities. While the Respondent has proffered no direct evidence in rebuttal of this allegation, the record evidence shows that Bailey had been hospitalized with a heart condition and that when he returned to work on August 21, he was no longer assigned to work on the platform, but rather was given the job of scraping and dusting stairwells; thereafter, for a few weeks, he was assigned the job of prepping bathrooms for painting. The record does not indicate what work he performed following the completion of the bathroom work, or whether he returned to work on the platform.

Based upon the allegations of the complaint and Bailey's testimony, it appears that he was given certain jobs to perform in the tower and was taken off the platform for several weeks in late August and early September. Thereafter, the record does not indicate the nature of his work. At the date of the hearing herein he had been employed as a painter for 2 years, and had continued to occupy the position of union steward. There is no contention that the alleged discrimination against him continued after early September, or that the Union filed any grievances regarding his being given job assignments in the tower for a period of time. Assuming arguendo that Bailey was taken off the platform for a period of time in order to keep him away from the other painters, I find the evidence insufficient to show that this change in assignment was in retaliation for any legitimate union activity in which he may have been engaged; rather, as indicated by Vice President Peterson's letter of September 18, it appears that the Respondent believed that Bailey had engaged in activities which interfered with production.<sup>25</sup> Therefore, I shall dismiss this allegation of the complaint.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>21</sup> See *Meyers Industries*, 281 NLRB 882, 885 (1986), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), where the Board stated: "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."

<sup>22</sup> Even in the absence of such conduct it appears that Johnson's discharge was imminent, as he was recognized by management as the leader of the slowdown upon the discharge of Todd and Blake.

<sup>23</sup> I credit the testimony of Cook and Alger in this regard.

<sup>24</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>25</sup> To the extent that Bailey's testimony differs from the testimony of Respondent's witnesses, I credit the witnesses for the Respondent.

3. The Respondent has not violated the act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

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<sup>26</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

#### ORDER

The complaint is dismissed in its entirety.

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ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.